Supreme Court, U.S.
FILED

No. 02 417 JUL - 5 2002

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IN THE

SUPREME COURT OF THE UNITED STATES

DONAN B. MCAULEY,

PETITIONER

V.

DORIS KENNAY OR D/B/A AS
IN TOTIDEM VERBIS, AND
SUPREME COURT OF ILLINOIS

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a state court assert it has no jurisdiction, ignore U.S. Const. Art. VI, Cl. 2, and dismiss on basis of pleadings motion only a private party cause of action set forth in a counterclaim based on 15 U.S.C. §1640(e) (Federal Truth-in-Lending Act).

2. May a state appellate court impose a monetary sanction upon a party for appealing a lower state court's refusal to entertain a federal statutory private party cause of action based on 15 U.S.C. §1640(e).

3. May a state appellate court as state actor under U.S. Const. Amend XIV impose sanctions without giving adequate notice of alleged conduct of party that court believes justifies sanctions before imposing sanctions that include sanctions for bringing counterclaim based on 15 U.S.C. §1601 et. seq.

4. May a state appellate court impose a monetary sanction upon a party for appealing a lower state court's judgment where the trial court denied properly requested discovery to the sanctioned party and the opposing party later admitted to facts that show the trial court lacked subject matter jurisdiction.

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The Petitioner, Donan B. McAuley, pro se, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Illinois.

OPINIONS BELOW

The order of the Illinois Supreme Court (App., p. 4) is unreported. The order of the State of Illinois Third District Appellate Court (App., p. 5-7) is unreported.

JURISDICTION

The Supreme Court of the State of Illinois entered its judgment on or about February 6, 2002, (App., p. 4), denied rehearing on April 9, 2002, (App., p. 4). This Court by order of Justice Stevens dated June 3, 2002 extended time for Petitioner to file this Writ until July 6, 2002. The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in separate Appendix at p. 3-4.

STATEMENT

Respondent Kennay (hereafter "Kennay") alleged a debt owed by Petitioner McAuley (hereafter "McAuley") first based on personal contract and then in a Second Amended Complaint citing 225 ILCS 415/28 filed in 14th Judicial Circuit, Whiteside County, Illinois, a court of general jurisdiction. McAuley had timely filed a counterclaim to the original Complaint (App., p.13-14) pursuant to 15 U.S.C. §1601, 1640(e). (App., p. 3-4).

The trial court, accepting the contention of Kennay that the state trial court did not have jurisdiction because the 15 U.S.C. §1601 et. seq. counterclaim was federal, dismissed with prejudice McAuley's counterclaim on the state's equivalent of a Fed. R. Civ. Pro. Rule 12(b)(6) motion to dismiss (735 ILCS 5/2-615). The docket entry setting forth trial court action on motion is at App., p. 19 , dated 9/27/99.

McAuley in due course perfected appeal to the Illinois Appellate Court, Third District, which, *inter alia*, upheld the counterclaim dismissal and lead off with McAuley's bringing of the counterclaim as reason to impose monetary sanctions.[1]

A copy of the Appellate Court's first and second sanctions order is at App., p.5-8. In between was the Appellate Court's order acknowledging that the Illinois Supreme Court had overruled the first sanctions order and ostensibly giving notice upon which it would consider a new sanctions order at App., p. 6. McAuley asserts that this second sanctions order (App., p.6-8) was also without proper notice under Illinois Supreme Court Rule 375(b), U.S. Const. Art. VI, Section 2, U.S. Const. Amend. 5 and 14.

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[1] The Appellate Court had its first attempt at sanctions overturned by the Illinois Supreme Court for failure to give notice to and otherwise follow Illinois Supreme Court Rule 375(b). Thereafter it reissued its sanction order, which Petitioner asserts was also not in compliance with Rule 375(b) or recognized Petitioner's rights to due process and equal protection of the law under U.S. Const. Amend. XIV as set forth herein.

McAuley's Petition for Leave to Appeal to the Illinois Supreme Court was denied.[2] App., p. 4. Throughout the federal questions were brought to the state court's attention with fair precision. See, *New York ex. rel. Bryant v Zimmerman, 278 U.S. 63, 67.* While the counterclaim dismissal is a constant throughout, McAuley asserts that the actions of the Illinois courts, individually and jointly, trampled not only federal statutory rights, but constitutional due process and equal protection rights.

This Petition for Writ of Certiorari is being filed pursuant to the grant of an extension of time until July 6, 2002 by order of Justice Stevens dated June 3, 2002.

WHY WRIT SHOULD BE GRANTED

The Illinois Supreme Court has decided an important federal question of the relationship between state courts and federal law in a way that conflicts with decisions of the United States Supreme Court. In the process McAuley was denied his constitutional rights under the 14th Amendment, U.S. Const. Amend XIV, due process and equal protection of laws where monetary sanctions were imposed upon him for appealing the state trial court's dismissal of a federal cause of action notwithstanding explicit statutory language providing for state court jurisdiction.

This case is also a suitable vehicle, in an important context, for the Court to further explain and implement that state judges are state actors within the meaning of the 14th Amendment. *See, People v. Garberding, 787 P.2d 154 (Colo. 1990).*

The cornerstone for the taking of a pound of flesh via sanctions from McAuley is that he properly read 15 U.S.C. §1640(e) to permit him to present a counterclaim

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[2] For ease of reference the second sanctions decision will refer only to the Illinois Appellate Court, Third District, but such reference shall include that its second sanctions decision was upheld by the Illinois Supreme Court by its denial of Leave to Appeal the appellate court ruling.

in the same state court action where he was being sued by a creditor for an alleged underlying debt and variable percentage finance charges.

Kennay's motion to dismiss McAuley's counterclaim required the state trial court to grant it only if there could be no set of facts that would support a cause of action. *Chicago Teachers Union, Local 1 v. Board of Education of City of Chicago, 189 Ill. 2d 200, 206, 724 N.E.2d 914 (2000).* Allegations of complaint must be interpreted in light most favorable to McAuley. *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 490-91, 675 N.E. 2d 584 (1996).* Kennay provided no authority to support her assertion that McAuley's counterclaim, based on 15 U.S.C. §1601 et. seq., was outside the jurisdiction of the state court. McAuley presented not only the language of §1640(e), but also several authorities that indeed the state court had jurisdiction including relevant portions of the United States Code Annotated. (App., paragraph 12, p. 25).

Not only has the appellate court and Illinois Supreme Court upheld the trial court's dismissal of a claim under 15 U.S.C.§1601 et. seq. for lack of jurisdiction, but imposed monetary sanctions upon McAuley for seeking to redress this miscarriage of justice. The state court as a state actor has also disregarded its own decisions that conflict with the imposition of sanctions on McAuley. E.g. *Janisco v. Kozloski, 261 Ill. App. 3d 963, 634 N.E.2d 1104, 1107 (Third Dist. 1976); In re Estate of Donald N. Graff, 117 Ill. App. 3d 900, 453 N.E.2d 1150 (Third Dist. 1983).* The state court creates an irrational system where it will allow one litigant to present a case on the merits as in *Graff* while barring McAuley. Also, as set forth in detail below, the state courts while discriminating against federal rights claiming no jurisdiction ignore its own precedent and rules that Kennay had assigned away her rights to a corporation and she no longer had any cause of action against McAuley.

First, for the U.S. Supreme Court to let stand the judgment and rulings against McAuley would only put

its imprimatur upon an insidious deprivation of citizen rights that Congress in 15 U.S.C. §1601 et. seq. sought to avoid. Congress in enacting 15 U.S.C. §1601 et. seq. sought to encourage its enforcement by "private attorneys general" and in both state and federal courts, §1640(e). Congress realized that it was protecting citizen debtors from being penalized by charges that more than likely would not meet the normal monetary level for court jurisdiction, so to protect individuals it enacted a civil penalty with 15 U.S.C. §1601 et. seq. to deter the unscrupulous creditor.

Second, intertwined are two important principles --

I. citizen access to courts and comity between courts, and

II. that a party is given adequate prior notice of the standards or basis applicable for monetary sanctions to be imposed before actions taken, adherence by the court to pronounced standards, and that the standards should in fact be enforced evenhandedly.

With respect to subpart I, the United States Constitution in Art. VI, cl. 2, (commonly referred to as the Supremacy Clause) provides for the United States Constitution and the laws of the United States to be the supreme law of the land and the judges in all states bound thereby notwithstanding any state law to the contrary. *Howlett v. Rose, 496 U.S. 356 (1990), Mondou v. New York, 223 U.S. 1 (1917), Testa v. Katt, 330 U.S. 386 (1947). Howlett,* in a unanimous decision, upholds the principle that state courts cannot block the enforcement of federal rights in state courts when Congress has authorized such an enforcement action. Decisions of the United States Supreme Court indicate that failure of a state to afford redress when required in order to remedy a federal wrong would raise the most serious questions under the Due Process Clause of the 14th Amendment. *Reich v. Collins, 513 U.S.106 (1994).* It is well-established a state may not choose to discriminate among litigants on the basis that federal law furnishes their underlying right. See, e.g., *Testa v. Katt, 330 U.S. 386 (1947). Also see, Hilton v. South*

Carolina Pub. Rys Comm'n, 502 U.S. 197, 207 (1991) (Supremacy Clause makes statute the law in every state, enforceable in state court.)

Open access to the courts without being subjected to punitive sanctions was recognized as a cherished right by U.S. Supreme Court Justice Stevens in *Talamini v. Allstate Insurance Company, 470 U.S. 1067, 1070-1071 (1985):*

> "Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access."

The words of 15 U.S.C. §1640(e) are straightforward that an action may be maintained in any court of competent jurisdiction, which would include either state or federal court. Herein McAuley properly filed as a counterclaim under 15 U.S.C. §1601 et. seq., a federal cause of action, in Illinois 14th Judicial Circuit, Whiteside County, a court of general jurisdiction.

The trial court (App., p. 19) dismissed McAuley's counterclaim with only "Plaintiff Mtn to Strike Aff Def & dismiss Counterclaim allowed." Kennay in brief (April 12, 2000) to appellate court at page 17 stated "The Plaintiff argued that the court did not have jurisdiction with which to adjudicate Defendant's counterclaim pursuant to the Federal Truth in Lending Act."

When McAuley appealed the dismissal of his counterclaim, the Illinois Appellate Court, Third District, upheld the trial court and imposed monetary

sanction upon McAuley for "frivolous" appeal. The Illinois Supreme Court has denied McAuley's Petition for Leave to Appeal the appellate court action. (App., p. 5). How the court orders are arrived at, as well as the substance of the appellate court orders made with the approval of the Illinois Supreme Court, have deprived McAuley of his due process and equal protection rights granted by and in accordance with the United States Constitution as applied to the states through the 14th Amendment.

Thus, not only has the Illinois state courts closed their doors to and discriminated against federal causes of action, but also have gone farther to impose punitive monetary sanctions against McAuley for daring to challenge their rulings. Thus, subpart II represents a state court action further depriving McAuley of his right to equal protection of law and right to property. The lack of justification for the imposition of sanctions against McAuley is evident from the implausible positions taken by the Illinois Appellate Court.

Before delving into specific points, it is important to briefly set forth the sanction orders of the appellate court, one that was vacated by the Illinois Supreme Court, and the sanction order subsequently issued that is challenged.

The original sanctions order by appellate court dated November 22, 2000 (App., p.5) was vacated by the Illinois Supreme Court for the appellate court totally ignored Illinois Supreme Court Rule 375(b), 155 Ill. 2d R. 375(b), that says: "If the reviewing court initiates the sanction, it shall require the party or attorney, or both, to show cause why such a sanction should not be imposed before imposing the sanction."

What the appellate court then did, after the rebuke by the Illinois Supreme Court, was to advise McAuley that it was going to issue a sanction based upon the points made in a specific section of Kennay's appellate brief. (See, quotation below on following page). McAuley responded to the points raised by Kennay. Kennay had

previously presented the same points to the trial court, which found them unpersuasive.

Then, without further notice, the appellate court imposed sanctions on July 17, 2001 (App., p. 6-8) for different reasons than advanced by Kennay in Issue VI; reasons McAuley was not given notice of.

McAuley asks this Honorable Court to uphold the straightforward basic principle that the right to respond must include adequate meaningful notice of what is to be responded to or otherwise a party is presented with the same situation of the initiating court imposing sanctions without notice as it did in its first failed attempt to impose sanctions upon McAuley. Since sanctions are penal in nature by state judges as state actors, U.S. Const. Amend. XIV applies.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean, 234 U.S. 385, 394 (1994).* The hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo, 380 U.S. 545, 552 (1965).* Meaningful manner means timely and adequate notice detailing the reasons for the contemplated action and effective opportunity to present argument and evidence orally. *Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970).*

In its May 17, 2001 rule to show cause (App., p. 6) the appellate court makes specific reason that it finds a frivolous appeal for the reasons stated by Kennay in Issue VI of her appellate brief and no other reason.

Kennay, after setting out Illinois Supreme Court Rule 375(b), states in her Issue VI:

> "An appeal is "frivolous", thus warranting an award of attorney fees by appellate court, if a reasonable, prudent attorney would not in good faith have brought such an appeal. *Paxton-Buckley-Loda Educ. Ass'n, IEA-NEA v. Illinois Educational Labor Relations Bd. (Ill. App. 4 Dist. 1999), 237 Ill. Dec. 908, 304 Ill. App. 3d 343, 710 N.E.2d 538.* In the case at bar, a reasonable, prudent attorney simply would not have conducted himself as did the Defendant. The case

began as a pro se court reporter's simple attempt to collect approximately $700.00 in money owed to her for services and transcripts ordered by the attorney Defendant. Since then, the Defendant has abused judicial process and bullied the Plaintiff with an onslaught of pleadings and procedural machinations. This case now provides the court with an important opportunity to protect an aggrieved litigant and an abused judicial system from further procedural frivolity which might otherwise be waged by the Defendant."

McAuley addressed these points, including that the identical Kennay points were raised before the trial court and the trial court imposed no sanctions. Notice can also be taken that the *Paxton* case by Kennay did not impose Rule 375(b) sanctions and did not elaborate on its sanction's rule or explain that behind the attorney standard, as set forth below, were that sanctions were only imposed where there was long-standing contrary legal authority or the attorney cited overruled authority. One can be somewhat certain that part of what Kennay refers to as "an onslaught of pleadings and procedural machinations" is McAuley's counterclaim under 15 U.S.C. §1601 et. seq. and the fact that Kennay in two successive complaints set forth alleged facts that did not match proofs before the trial court as referenced in July 19, 1999 docket entry dismissing Kennay's first amended complaint. (App., p. 19). While Kennay alleged she personally performed the services where payment was sought, the truth was the opposite. A factual contention well within the knowledge of Kennay. What Kennay and the appellate court ignore is that McAuley did present successful Rule 2-615 motions.

But then the appellate court reissues its sanctions order on other asserted reasons not in Kennay's Issue VI which reasons McAuley was not given notice of on May 17, 2001.

In this July 17, 2001 sanctions order the appellate

court referenced the following topics, which will be responded to specifically hereafter:

A. Improper for McAuley to argue trial court erred in dismissal of McAuley counterclaim based on 15 U.S.C. §1601 et. seq.

B. Appellate court creates "finance agency" rationale definition as standard for 15 U.S.C. §1601 et. seq. to be applied to Kennay.

C. Constitutional claims were either waived or McAuley lacked "standing".

D. McAuley discovery motion denial was proper and granting motion would have caused impermissible delay in proceedings.

E. Improper for McAuley to argue trial court erred in not imposing sanction under Rule 137 for Kennay counsel signing motion without reasonable inquiry.

F. McAuley challenge to Kennay business status improper.

In so acting, the appellate court was depriving McAuley of property (i.e., imposition of monetary sanctions) without due process since it told McAuley it was considering sanctions based on the statements made by Kennay in Issue VI of her appeal brief, but then acts contrary to this statement to impose sanctions on a basis McAuley was not given notice of with no corresponding opportunity to respond thereto. Procedural due process imposes constraints on governmental decisions, which deprive individuals of "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge, 424 U.S. 319, 332 (1975).* The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not invoke the stigma and hardship of a criminal conviction, is a principle basis to our society. *Mathews, ibid at 333.*

The appellate court November 2000 sanctions order was rightly reversed for not giving any notice whatsoever before its issuance, but it is equally important for due process rights that the appellate court be required to provide notice that permits a party

to know what should be responded to. To not require this on point notice effectively denies a party the right to a meaningful reply, see *Armstrong v. Manzo, 380 U.S. 545, 552 (1965).*

It is not due process for a party to reply to certain claimed impropriety and have the court then disregard the claimed impropriety and sanction for other conduct not noticed to the party. Illinois is now in conflict with *Mattly and Vallance v. Spiegel, Inc. and First Consumers National Bank, 19 S.W. 3d 890 (Tex 2000),* holding that a court's failure to provide particulars upon which sanctions are based is an abuse of discretion that renders the order unenforceable and warrants reversal of the sanction.

The appellate court action is furthermore suspect for it would not be widely speculative that it would hold some animus for the fact that McAuley successfully challenged its November 2000 order showing the court's blatant disregard of the wording of Rule 375(b) itself. In its November 2000 order the appellate court only stated that sanctions were based on the prong of Rule 375(b) related to "frivolous" appeal. Then after it was required to vacate its November 2000 order, it states, without specifics, in its July 17, 2001 order the conclusionary statement that the sanctions are based on "frivolous appeal" and "improper motive". If the appellate court was previously silent on "improper motive", then there can be no later reasonable holding that McAuley was adequately given his due process and equal protection opportunity to respond to such a claim. In addition, the appellate court further prejudices McAuley by not setting forth any facts or particulars to prove its claimed reliance on "improper motive". Presumably the "improper motive" included McAuley's appeal of the trial court dismissal of his 15 U.S.C. §1601 et. seq. counterclaim.

The appellate court must do more than take and quote two words from the rule to justify monetary sanctions. Similarly the court July 17 2001 order either provides no facts to support its conclusion or

totally convolutes McAuley's straightforward position. As an example of no facts one need only look at its conclusion that McAuley's motion for discovery would delay proceedings. The motion for discovery was filed and denied by the court on August 16, 1999 when a trial date was not yet set. Later on August 25, 1999 the trial date was set to be October 25, 1999 (App., p. 19). During this same period, Kennay had only filed her second amended complaint on July 26, 1999 and McAuley still had right to file answer and any counterclaim in normal compliance with rules in August. McAuley was not engaging in delay for Kennay had just newly raised the issue of employer/ employee before the related discovery was sought.

Illinois Supreme Court Rule 287(a) permitted McAuley to file discovery motion with court so what the appellate court is really sanctioning McAuley for is his taking the opportunity to attempt to use legitimate right for access to court procedure. As can be seen (App., p. 14 - 18) the discovery request was narrowly tailored to the new Kennay assertions in her second amended complaint of employer/employee relationship between her and one Tammy Jones. The discovery sought information that would only be in the possession of Kennay as the party claiming the employer relationship. As Kennay had shown a disposition to not allege the truth (App., p. 19, 7/29/99 docket entry) it was not unreasonable for McAuley to seek to verify the newest Kennay allegations. As set forth below, when Kennay documents were finally obtained they raised question about the veracity of the trial testimony of both Kennay and Jones.

Moreover, the appellate court further ignored material issues raised by McAuley in his timely filed June 7, 2001 response:

1. Trial court lacked subject matter jurisdiction based on newly discovered evidence.

2. Appeal was related to newly enacted statute with no prior Illinois decisional authority.

3. Trial court rejected sanctions Kennay asserted in Appellate Brief Issue VI upon which appellate court based its May 17, 2002 rule to show cause.

4. Appellate court did not invoke waiver against Kennay for failure to cite authority in Issue VI of her brief or in trial court record.

5. Kennay made inaccurate or false pleading representation in trial court pleadings of complaint and first amended complaint denying McAuley right to know what Kennay claim was.

6. McAuley requested oral argument but the appellate court ruled without permitting the requested argument or stating why it was denied.

In specific response to the set forth points of the appellate court's July 17, 2001 sanctions order, Point A set forth above that it was sanctionable conduct for McAuley to appeal the trial court's dismissal of his 15 U.S.C. §1601 et. seq. counterclaim has been addressed above. Related to Point A is the appellate court's Point B. Point B is but a specific contention by the appellate court interpreting 15 U.S.C. §1601 et. seq. that is legally immaterial as well as legally faulty. The appellate court's making of a factual determination on whether or not Kennay is a "finance agency" is improper legal standard for a motion to dismiss which is to take all facts as pled as being true. The appellate court uses misplaced analysis to create terms not present in 15 U.S.C. §1601 et. seq. and to then justify its conclusion of a "frivolous" appeal based on its created faulty logic.

The appellate court failed to recognize that "finance agency" is not a term referenced in 15 U.S.C. §1601 et. seq., but that the relevant inquiry is whether or not a person or entity is a "creditor" as defined in §1602 Notwithstanding that the appellate court without any legal justification ignored that it was to be reviewing a motion to dismiss upon which McAuley was denied the opportunity to present evidence at trial, it ignored the plain language of 15 U.S.C. §1601 et. seq. and its definitions in §1602 to rule on its "self-styled" "finance agency" rationale ignoring the clear language of 15

U.S.C. §1601 defining "creditor", "credit sale" and "finance charge".

The state court imposed sanctions on the basis that it was frivolous for McAuley to appeal the lack of state court jurisdiction for his federal 15 U.S.C. §1601 counterclaim. It did so on rationale asserting that Kennay was not a "finance agency". The appellate court ignored the plain language of the counterclaim, which is at App., p.13-14. As set forth in the counterclaim, what is included within 15 U.S.C. §1601 et. seq. is the terms "creditor", "credit sale" and "finance charge". There is no "finance agency" definition. McAuley in a Memorandum for Rehearing to the Illinois Supreme Court dated April 27, 2001 set forth that Kennay had in a judicial forum admitted facts for finding her a creditor as defined in at §1602(f) as she had assessed finance charges against McAuley. (App., p.31). To be a creditor only requires that a person in connection with sales of property or service (App., paragraph 12, p.25) requires or may require the payment of a finance charge. A charge, even if designated a late charge but based on a percentage charge variable over time, is a finance charge as determined by the only U.S. Circuit Court to address the issue. *Hahn v. Hanks Ambulance Service Inc., 787 F.2d 543 (11th Cir. 1986).* Kennay's later admission of assessing finance charges and her actual invoices demonstrate that McAuley had reasonable basis to appeal the trial court's dismissal of his counterclaim and that the appellate court sanctions rationale was faulty.

If allowed to stand, the sanctions would be based on a faulty creation and/or interpretation of the terms of 15 U.S.C. §1601, undermine the Supremacy Clause of the U.S. Constitution and conflict with other legal decisions. To allow unscrupulous persons to act contrary to the requirements of 15 U.S.C. §1601 in even one instance and to allow a state to close its courthouse door, contrary to Congressional direction, and then to sustain sanctions for attempting to redress the state court's denial of constitutional and statutory right plus

due process and equal protection of the law can not be affirmed. Also relevant is that the appellate court bases its sanctions order on "facts" that do not exist for Kennay has admitted she was imposing finance charges on the McAuley alleged debt.

McAuley understands that Kennay may again raise the straw man of the size of the debt. The size of the debt is irrelevant and immaterial. If the amount of the transaction had been determinative, Congress would have said so. In fact, Congress could have been said to consider that small sums of money would most likely be involved when it provided for an action to lie regardless of the amount of money in controversy. See, where in §1640(e) it is specifically provided that there is no monetary threshold that has to be reached to invoke judicial action.

Point C is a baseless claim by the appellate court that McAuley lacked standing or otherwise waived rights. In its vacated November 2000 and later July 17, 2001 order the appellate court cites McAuley's lack of "standing" to justify imposing sanctions.

In November 2000 the appellate court cited *Chicago Teachers Union Local 1 v. Board of Education of City of Chicago, 189 Ill.2d 200, 724 N.E. 914 (2000).* However, as stated in *Chicago Teachers at 918:*

> "Under Illinois law, lack of standing is an affirmative defense (cite omitted). A plaintiff need not allege facts establishing standing. Rather it is the defendant's burden to plead and prove lack of standing. (cites omitted)."

One can only surmise that the appellate court's dropping its citation and reliance on this case in its July 17, 2001 order was its recognition that it was improperly cited in November 2000 and directly opposite to the point cited for. That is because the record before the appellate court was that Kennay had not filed affirmative defense as required, therefore, McAuley's "standing" was not properly attacked in the lower court and no waiver existed. Kennay in her sanctions justification (Issue VI quoted above) does not

mention "standing". McAuley was subject to a distinct and palpable injury if found to owe Kennay money. McAuley is further supported by *Walker v. The State Board of Elections, 65 Ill.2d 543, 359 N.E.2d 113 (1976),* where a complaint alleged a defendant had violated the act whose constitutionality was challenged, jurisdiction was then obtained and danger to defendant was immediate. McAuley had filed an eight-page written argument with the trial court contesting the constitutionality of 225 ILCS 415/01 et. seq. (App., p. 26 – 29 setting forth a portion of written argument accepted by trial court; and App., p. 19 (Rule 19 claim of unconstitutionality filed by defendant). For the appellate court to claim that McAuley had not raised claims of unconstitutionality in trial court is the grosses of misstatements.

For additional waiver claims the appellate court cited *People v. Nielson, 187 Ill. 2d 271, 196(sic), 718 N.E.2d 131, 147 (1999),* applicable only to jury trials and the trial court had no jury. The appellate court fails to cite its more relevant controlling non-jury waiver case under Illinois Supreme Court Rule 366(b)(3)(ii) of *Steadman v. Steadman, 236 Ill. App. 3d 703, 670 N.E.2d 1146, 1153 (1996).*

Not only has the passage of time showed that Kennay had documents undermining her trial position(s), but the appeal of the trial court was not frivolous and the appellate court brought forth no evidence to support its claim of granting McAuley discovery would impede the trial. The time sequence set forth above shows Kennay raised new claim July 26 and McAuley filed discovery request related to the newly raised employer/employee allegation on August 16 when no trial date was set. The discovery request was narrowly drawn with reference to Kennay and the person (Tammy Jones) identified in Kennay pleading, documents related to whether or not an employer/employee relationship had indeed existed and which were by law required to exist. Later documents showed that Kennay was paying Jones with personal check, not business check and Jones was not

being paid by hour as an employee would be. (App., p. 20).

The trial court did deny McAuley right to put on defense to allegations he faced, even to just show that they were false and 225 ILCS 415/01 et. seq. was not applicable because that act created right only for person performing service and Kennay was not that person and Kennay had no legal basis to collect for another person.

The trial court initially denied McAuley the opportunity to put on a defense by stating:

> "Another judge, specifically Judge DePorter, made a ruling with regard to Mr. McAuley's request for production. That ruling was denied. Many of the things that were requested in that request for production found themselves in subpoena duces tecum. Rule 237 provides that those items previously discovered could be requested in a Rule 237 subpoena duces tecum. That fact that there was not such prior discovery allowed specifically and a specific request for production shows up in a request -- in a subpoena duces tecum is, to this court, a clear violation of rule 237." (App., p.22-23).

The appellate court cited McAuley's appeal of this trial court ruling as a basis for sanctions. Thus, the court is denying a party a right to bring forth evidence at trial that is solely within the control of said opposing party and that because of the nature of the information being required by law to be in existence there was reasonable expectation by McAuley that the information existed and was easily obtainable without undue burden on Kennay. The disingenuous catch-22 operation of the court's ruling can be seen by a comparison of the actual court rules being applied.

Illinois Supreme Court Rule 287(a): "No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court."

Illinois Supreme Court Rule 237(b): "The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be

required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at trial of the originals of those documents or tangible things previously produced during discovery. ..." (Eff. June 1, 1995, Illinois Supreme Court Order (M.R. 3140).

A reading of Rule 287(a) shows that it has applicability only to pre-trial discovery and nothing more. It does not apply to bringing evidence solely under the control of an opposing party to trial so that a party can have access to evidence necessary for his or her defense.[3] What the trial court did, and has been upheld by the reviewing courts, is to deny McAuley a fundamental right to present a defense and counter allegations made in Kennay's second amended complaint.

For the first time in her Second Amended Complaint, Kennay alleged an employer/employee relationship with one Tammy Jones. In prior pleadings Kennay had asserted that she had personally done the work she was basing her complaint on. McAuley challenged such allegations and the trial court found:

> "2-615 Mt. allowed. Deft has shown proof that someone other than Plaintiff provided Ct Reporting services and proof does not comply w/allegations of complaint. Nor is there allegation that "Tammy Jones" is Employee of Plaintiff. 1st Am complaint stricken." (App., p. 19, docket entry 7/12/99.)"

Previously another McAuley Rule 2-615 motion was granted. (App., p. 18, docket entry 5/18/99.)

Given that Kennay created burden on trial court and McAuley by filing untrue allegations, it was then not unreasonable for McAuley to seek facts before trial to test the veracity of the third restatement of Kennay's

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[3] In addition to denial of inquiry, the trial court quashed trial subpoenas without proper notice of hearing pursuant to 14th Circuit Local Rule 4.1(d) with trial court citation to Supreme Court Rule 236(b) relating to police reports, which did not have applicability and reliance on trial court's denial of prior McAuley motion for pre-trial discovery.

allegations, be able to prepare a defense, or be able to stipulate to facts to streamline proceedings. For the appellate court, it was sanctionable conduct to even seek discovery of, for example, to obtain documents an employer is legally required to keep on its employees when faced with a Kennay allegation of an employer/ employee relationship with Jones.

As noted elsewhere herein, when McAuley was able to obtain documents related to the alleged debt he owed what appears are documents that undercut the employer/employee allegation and a document that Kennay had assigned the alleged debt to Adams, Cooper & Marks (App., p. 19) and Kennay was paying Jones out of a personal checking account, not In Totidem Verbis business account (App., p. 20), not recording hours worked or compensating for hours worked (App., p. 20) and that Kennay had no I-9 form on Jones as required of all employers for employees under 8 CFR 276a.2. As having these documents for presentation to the trial court would bring forth a result contrary to that of the trial court shows McAuley being denied equal access to court proceedings and a denial of due process and equal protection of law.

A payroll sheet for Jones (App., p. 20) casts doubt on Kennay claim Jones was an employee working for hourly wage. The records show Jones was not recording hours worked as would be required by 29 U.S.C. §206 and 207 and also there was notation that Jones would not be paid unless customer paid which would be contrary to 29 U.S.C. §206. The payroll sheet also shows that what Jones testified to as a reasonable and proper charge of $696.60 against McAuley was inflated when compared to Jones' document of charges. Thus, McAuley by not having the document at time of trial was denied the opportunity to test the credibility of Jones by documents that were contrary to her trial testimony and related to relevant issue of the reasonableness of the charges.

Most telling against the appellate court that it was acting outside the parameters of U.S. Const. Amend XIV

to deprive McAuley of the due process and equal protection of the laws is its total disregard of established principles developed under Illinois Supreme Court Rule 375(b).

One of the requirements for a finding of a frivolous appeal is that the trial court opinion was so cogently explained that an appellant could not have an expectation that he or she would prevail in the appellate court. *Mays v. Chicago Sun-Times* et. al., *865 F.2d 134 (7th Cir. 1989) (interpreting Fed. R. App. Pro. 38).* There was no such cogent explanation as McAuley was faced with the trial court stating, e.g., as to the 15 U.S. §1601 counterclaim, "Plaintiff Mtn to Strike Aff Def. Dismiss Counterclaim allowed."; as to unconstitutionality, "I find that act or that section of the act is not unconstitutional.", and the trial court did not even address application of 225 ILCS 415/01 et. seq. to a claimed debt by a person not the shorthand reporter present at neither the deposition nor the fact that 225 ILCS 415/01 et. seq. does not recognize any business entity other than a professional corporation, which Kennay was not. (App., p. 26-29).

Not until her second amended complaint (7-16-99) did Kennay assert that McAuley was liable under 225 ILCS 415/01 et. seq. and especially its §28 that was effective August 1, 1997 with the instant controversy involving conduct of January 13, 1998. (P.A. 83-73, §28 added by P.A. 90-295, §5 eff. Aug. 1, 1997.) This is a very relevant fact as Illinois courts deny motions for sanctions where there is little Illinois authority on an issue. Herein, this was a case of first impression. *Forest Preserve District of DuPage County v. Brookwood Lane Venture, 229 Ill. App. 3d 978, 985-6, 595 N.E.2d 136 (2nd Dist. 1992)(dearth of timely relevant authority on point indicates that the issues raised warranted attention, no 375(b) sanction); First National Bank of Chicago v. Mid-America Federal Savings Bank, 303 Ill. App. 3d 176, 185, 707 N.E.2d 673 (1st Dist. 6th Div. 1999) (in light of fact that there is little authority on (two issues) there is no evidence to suggest that Mid-America's*

appeal was brought in bad faith.) Alcantar v. Peoples Gas Light & Coke Co., 288 Ill. App. 3d 644, 651, 681 N.E.2d 993 (1997).

Rule 375(b) sanctions have only been imposed where party advanced claim was contrary to long-standing precedent or used multiple previously overruled court cases as authority. *State Farm Fire and Casualty Company v. Miller Electric Company, 231 Ill. App. 3d 355, 596 N.E.2d 169 (2nd Dist. 1992); LaGrange Memorial Hospital v. St. Paul Insurance Company, 2000 Ill. App. LEXIS 872 (1st Dist. 6th Div. 2000).* McAuley herein was not engaging in such conduct to support sanctions, and again, the legislative enactment the trial court used to impose liability upon McAuley had only been enacted six months prior to the alleged applicable conduct and there was no prior reported litigation on the entire Act, 225 ILCS 415/01 et. seq. The appellate court ignores its own prior decision on sanctions. In *Janisco v. Kozloski, 261 Ill. App. 3d 963, 634 N.E. 2d 1104, 1107 (3rd Dist. 1976),* after stating that sanctions under Rule 375 should not be imposed except in the most egregious of circumstances, refused to impose sanctions based on the criteria of the trial attorney's "youth and inexperience". Facts available to the appellate court demonstrate that it ignored this criteria as McAuley was at most presenting his second appellate case. The appellate court, while denying McAuley's jurisdictional basis under 15 U.S.C. §1640(e) had held in *In re Estate of Donald N. Graff, 117 Ill. App. 3d 900, 453 N.E.2d 1150 (3rd Dist. 1983),* that §1640(e) allowed counterclaim under facts that debt was due in one payment with interest (e.g. finance charges). McAuley was advancing position reasonably supported in fact and law, or its extension, not contrary to existing decision by same appellate court.

The contortions the appellate court would go through to justify sanctions is seen in its statement as follows from its July 17, 2001 order:

"Furthermore, the appellant argues that the trial court erred by failing to sanction Kennay's legal

counsel for signing a motion the counterclaim, which was granted. We fail to see why the trial court's failure to sanction Kennay's counsel when it granted the motion to strike was error."

In App., paragraphs 11 and 13, p. 23 - 26) McAuley sets forth his argument to the trial and appellate courts why sanctions were NOT justified. The proof presented by McAuley to the trial court showed that there was legal authority for the state court to have jurisdiction of McAuley's counterclaim plus there was the plain language of §1640(e) itself. For Kennay's counsel to argue that a state court had no jurisdiction of a federal claim showed that Kennay's counsel had not made any inquiry and to present a position without reasonable inquiry was a violation of Rule 137. Contrary to the appellate court the court's ruling on counterclaim jurisdiction is irrelevant. For the trial court to dismiss the counterclaim was error, for Kennay's counsel to file a motion without reasonable inquiry was sanctionable error, and two errors do not make it right. To compound matters, the appellate court without justification sanctions McAuley for attempting to bring forth the trial court's error.

The appellate court claims it was specious for McAuley to bring forth evidence about Kennay business entity. However, inquiry was relevant to Kennay's credibility and the credibility of her complaint allegations (App., p. 23) as McAuley attempted to explain to the trial court. Remember, Kennay had two prior complaints dismissed for allegations not matching the truth. The inquiry was also relevant to Kennay's claim under 225 ILCS 415/01 et. seq. (App., p. 23) as there is reasonable argument that the act does not permit business organizations to utilize its liability provisions. (App., p. 26 to 29).

The Illinois Supreme Court and its appellate court ignored the trial court lacked subject matter jurisdiction.

As raised by McAuley in his April 27, 2001, Memorandum for Rehearing, McAuley presented

probative evidence that the Illinois trial court did not have subject matter jurisdiction.[4]

Subject matter jurisdiction in Illinois state courts may be raised at any time. *Dubin v. The Personnel Board of the City of Chicago, 128 Ill. 2d 490, 539 N.E.2d 1243, 1245, 132 Ill. Dec. 437 (1989).* Court's subject matter jurisdiction is properly raised on a Petition for Rehearing. *Hart v. Valspar Corporation and American Steel Container Company, 252 Ill. App. 3d 1005, 625 N.E. 2d 220, 192 Ill. Dec. 260 (1st Dist. 1993); Stonitsch v. Laredo Construction Co., 221 Ill. App. 3d 902, 908, 583 N.E.2d 49, 164 Ill. Dec. 495 (1991).* The trial court, (Tr. p. 87-88, App., p. 23) denied McAuley the opportunity to question Kennay about Adams, Cooper & Marks, a debt collection firm to whom Kennay assigned her claimed debt against McAuley. A January 22, 1999 communication to Kennay from Adams, Cooper and Marks (App., paragraph 4, p. 19) verifies that Kennay had assigned her alleged debt from McAuley to her to Adams, Cooper & Marks.

In Illinois the same appellate court that imposed sanctions on McAuley set forth the principle that an assignment places the assignee into the shoes of the assignor. *Board of Managers of the Medinah on the Lake Homeowners Association v. Bank of Ravenswood et. al., 295 Ill. App. 3d 131, 692 N.E. 2d 402, 220 Ill. Dec. 629 (3rd Dist. 1997).* Communication (App., p. 20.) between Kennay and Adams, Cooper & Marks in January 1999 sets forth fact and acknowledges that there was an assignment from Kennay to Adams, Cooper & Marks in January 1999 identifying the alleged debtor (McAuley) and amount of debt ($762.01).

With the assignment, Kennay gave up her right to performance and had no right to seek payment from McAuley by filing suit on March 31, 1999. Adams, Cooper & Marks, a Minnesota corporation, (App., p. 20-21),

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[4] Trial court had denied McAuley's motion for pretrial discovery and trial document subpoenas that would have dislodged the same information. The appellate court cited McAuley's appeal of the trial court's denial of discovery as grounds for sanctions.

as an assignee from Kennay has no standing to assert the claim in the trial court. Relevant is 735 ILCS 5/2-416, which states in part: "No corporation may appear as assignee or subrogee in a small claims proceeding." Thus in 99SC682ST neither Kennay nor Adams, Cooper & Marks had standing to give trial court subject matter jurisdiction

CONCLUSION

If not reversed, Illinois state courts will have established, contrary to decisions of the United States Supreme Court, that a state trial court can bar the door to application of Art. VI, cl.2, Supremacy Clause, of the U.S. Constitution and a reviewing court can sanction a litigant's appeal of the trial court's denial of a constitutional right. U.S. Const. Amend XIV, sec. 1 becomes null and void in Illinois. Due Process and Equal Protection of Law becomes but an illusion.

What the Illinois courts are establishing is that there is no rule of law, but decisions based upon the whim of whoever is on the bench at the moment of decision. Litigants will face what McAuley has experienced herein, that is, the state court will recognize no right based upon federal law, the state court will no longer rely on prior jurisprudence that sanctions are only imposed where an appeal is made in the face of long-standing contrary authority, or the chilling effect that a litigant cannot dare challenge a recent legislative enactment without facing the imposition of monetary liability, and that Illinois Supreme Court amendments to Rule 237(b) create an irrational class distinction between litigants based on whether or not in small claims actions to now deny all right for litigants in small claims actions to present evidence at trial notwithstanding Rule 287 language that states the rule applies only to pre-trial discovery. This new amendment to Rule 237(b) interpretation denies a litigant the right to subpoena witnesses for trial or to have them bring documents that may provide a defense. the other side of the coin is that litigants bringing a claim have unbridled freedom to state anything they

want for their advantage as long as they can control access to information and can secret damaging evidence.

When appealing now the Illinois litigant should be prepared to be sanctioned without notice and/or a meaningful opportunity to respond for Illinois courts apply its Supreme Court Rule 375(b) to permit sanctions even if an original notice misleads the litigant as to what it considers to be the conduct that is sanctionable. Now, if the trial court presents even a vague or convoluted explanation of its decision, a litigant can be subject to sanctions on appeal. All of which has an immense impact upon the general public and has created the situation where court decisions say one thing and judges act completely opposite to the principles of expressed law.

In most important aspects, the Illinois courts are telling its citizens through McAuley that there is no open access to its courts, due process can be disregarded, and the laws will not be necessarily applied evenhandedly, and/or based upon fact and legal principle. Litigants can leave federal rights outside the Illinois state courthouse door for they will not be recognized.

The sanctions imposed by the appellate court and upheld by the Illinois Supreme Court should be reversed on the basis that 1) the trial court did not have subject matter jurisdiction of the Kennay complaint because her cause of action had been assigned to a corporation, or 2) the imposition of sanctions was not lawfully done as violative of McAuley's due process and equal protection rights under the U.S. Constitution as applied to the states through the 14th Amendment.

Respectfully submitted,

/s/ Donan B. McAuley

Donan B. McAuley, Pro Se

Donan B. McAuley
Pro Se
1747 Cindy Court
Bettendorf IA 52722
Tel 563-508-5299
Dated: July 5, 2002

Certificate of Service

The undersigned certifies he mailed, postage prepaid, on or before July 6, 2002, 40 copies of his Petition for Writ for Certiorari and Appendix to United States Supreme Court, Attn Clerk of Court, Supreme Court Building, Washington DC 20543; three copies to lMr. James Mertes, Attorney, 102 E. Route 30, Rock Falls Il 61071 and copy to Supreme Court of Illinois, Attn Clerk of Court, Supreme Court Building, Springfield, IL 62706.

/s/ Donan B. McAuley

Donan B. McAuley

Supreme Court, U.S.
FILED

02 417 JUL - 5 2002

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

DONAN B. MCAULEY,

PETITIONER

V.

DORIS KENNAY OR D/B/A AS
IN TOTIDEM VERBIS, AND
SUPREME COURT OF ILLINOIS

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

APPENDIX
PETITION FOR WRIT OF CERTIORARI

DONAN B. MCAULEY
PRO SE
1747 CINDY CT
BETTENDORF IA 52722
563-508-5299

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A. STATUTES

1. U.S. Const. Art. VI cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. U.S. Const. Amend. XIV Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 15 U.S.C. §1602 Definitions and rules of construction:
(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title [15 USCS §§1601 et. seq.].
(d) The term "person" means a natural person or an organization.
[f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. ...

[g] The term "credit sale" refers to any sale in which the seller is a creditor. ...

4. 15 U.S.C. §1640(e):
"Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, . . ."

B. OPINIONS AND JUDGMENT BELOW

1. Letterhead of
Supreme Court of Illinois
To: Mr. Donan B. McAuley
1747 Cindy CT
Bettendorf IA 52722
Dated April 9, 2002
In re: Doris J. Kennay, respondent v. Donan B. McAuley, petitioner No. 92570

"Today the following order was entered in the captioned case:
"Motion by petitioner, pro se, to recall and stay this Court's mandate. Motion Denied without prejudice to the movant's right to seek relief from the Third District Appellate Court or the United States Supreme Court.
"Order entered by Justice Kilbride."
Very truly yours,
s/ Juleann Hornyak
Clerk of the Supreme Court"

2. State of Illinois
Supreme Court
"On the sixth day of February, 2002, the Supreme Court entered the following judgment:

No. 92570	
Doris J. Kennay,	Petition for Leave
Respondent	to Appeal from
v.	Appellate Court
Donan B. McAuley	Third District

Petitioner 3-99-0951
99SC682ST

"The Court having considered the Petition to appeal as a matter of right or petition for leave to appeal and being fully advised of the premises, the petition to appeal as a matter of right or petition for leave to appeal is DENIED."

"As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

(Seal) s/Juleann Hornyak
Clerk, Supreme Court of
the State of Illinois

3. Letterhead:
State of Illinois
Third District Appellate Court
Dated November 22, 2000
To: Mr. Donan B. McAuley
1747 Cindy CT
Bettendorf IA 52722-1800
RE: General No. 3-99-0951
Circuit Court No. 99SC682ST
County of Whiteside
Kennay, Doris v. McAuley, Donan

"The Court has this day entered in the above entitled cause the following order:

"On this court's own motion, pursuant to Supreme Court Rule 375, we find that the instant appeal was frivolous. We therefore remand this cause to the circuit court with instructions that the circuit court conduct a hearing and determine the appellee's reasonable costs and expenses on appeal, including attorney fees. Upon the circuit court's determination of said costs and expenses, the appellant is ordered to immediately reimburse the appellee.

/s/ Gist Fleshman

GIST FLESHMAN, Clerk
Appellate Court Third District"

4. Letterhead:
State of Illinois
Third District Appellate Court
Dated May 17, 2001
To: Mr. Donan B. McAuley
1747 Cindy CT
Bettendorf IA 52722-1800
RE: General No. 3-99-0951
Circuit Court No. 99SC682ST
County of Whiteside
Kennay, Doris v. McAuley, Donan

"The Court has this day entered in the above entitled cause the following order:

"Pursuant to the Illinois Supreme Court's order of April 4, 2001, we hereby vacate our order of November 22, 2000, imposing sanctions on the appellant Donan McAuley. We further order the appellant to show cause, on or before June 7, 2001, why sanctions should not be imposed pursuant to Illinois Supreme Court Rule 375(b) for filing a frivolous appeal. We note that the appellee sets forth the basis for finding this appeal frivolous in Issue VI of her brief.

/s/Gist Fleshman
GIST FLESHMAN, Clerk
Appellate Court Third District"

5. Letterhead:
State of Illinois
Third District Appellate Court
Dated July 17, 2001
To: Mr. Donan B. McAuley
1747 Cindy CT
Bettendorf IA 52722-1800
RE: General No. 3-99-0951
Circuit Court No. 99SC682ST
County of Whiteside

"The Court has this day entered in the above entitled cause the following order:

"This court issued a rule 375(b) rule to show cause, and the appellant filed a response. After careful review, we find that the appellant's appeal was frivolous for the following reasons.

"In his original appellate brief, the appellant raised four constitutional issues. Each of these issues was either waived because it was made for the first time on appeal, clearly without legal merit, or was not properly before us because the appellant lacked standing to raise it.

"The appellant also claimed that the trial court erred by dismissing his counterclaim, which alleged that Kennay failed to comply with the federal Truth in Lending Act (Act) (15 U.S. C. sec 1601 et seq.). We can find no legal or factual basis for the appellant's claim that Kennay's business, court reporting, was a finance agency in a credit transaction and thus governed by the Act. Furthermore, the appellant argues that the trial court erred by failing to sanction Kennay's legal counsel for signing a motion to strike the counterclaim, which was granted. We fail to see why the trial court's failure to sanction Kennay's counsel when it granted the motion to strike was error.

"The appellant also asserted on appeal that he was entitled to extensive litigation in Kennay's small claims case seeking to recover $700 in court reporter fees. The trial court refused to allow the appellant access to documents concerning the relationship between Kennay and an employee, the employee's personnel file, and records pertaining to Kennay's federal and state income tax and insurance coverage. The relevance and materiality of these documents to the contractual issue before the trial court eludes us. Moreover, the disproportionate and needless delay and expense that Kennay would have incurred if the appellant's request had been granted is clearly evident.

"The appellant interposed another specious argument concerning Kennay's operation of her business under a name other than her own. The issue was irrelevant to the outcome of the underlying case. There is simply no legal support for the appellant's apparent defense that an unincorporated employer is barred from recovering damages due to a breach of contract if the employer is operating under a fictitious business name. Like many of the appellant's arguments on appeal, there was no legal support cited for this claim; thus, this issue was also waived.

"Finally, the appellant's argument that the trial judge ignored the evidence and improperly relied on his own personal experience to decide the case appears to have been based on the appellant's gross misinterpretation of a single isolated statement in the court's oral findings. A plain reading of the trial court's ruling shows that it properly based its decision on the evidence and its own credibility determinations.

"Taken as a whole, the appellant's appeal was patently frivolous and brought for improper purposes. We therefore remand this cause to the circuit court with instructions that it conduct a hearing to determine the appellee's reasonable costs and expenses on appeal, including attorney fees, and to enter judgment thereon. Upon the circuit court's entry of judgment, the appellant is hereby ordered to make payment of that sum to the appellee. See 155 Ill.2d R. 375(b).

/s/ Gist Fleshman
GIST FLESHMAN, Clerk
Appellate Court Third District"

6. Letterhead:
State of Illinois
Third District Appellate Court
Dated October 24, 2001
To: Mr. Donan B. McAuley
1747 Cindy CT
Bettendorf IA 52722-1800
RE: General No. 3-99-0951

Circuit Court No. 99SC682ST
County of Whiteside
Kennay, Doris v. McAuley, Donan

"The Court has this day entered in the above entitled cause the following order:

"On the court's own motion, the mandate is recalled. The circuit clerk of Whiteside County is directed to return the mandate to the Third District Appellate Court.

/s/ Gist Fleshman
GIST FLESHMAN, Clerk
Appellate Court Third District"

C. OTHER RELEVANT MATERIAL

1. State of Illinois
In the Circuit Court of 14th Judicial Circuit,
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.
Donan B. McAuley Answer and Counterclaim
Defendant Filed August16, 1999

"Defendant Donan B. McAuley, pro se, for his Answer to Plaintiff's Scond Amended Complaint states:

"1. Defendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 1.

"2. Defendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 2.

"3. Defendant admits that a person identifying herself as Tammy S. Jones did represent herself as a court reporter on January 13, 1998. Defendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 other than as set forth in the first sentence of this paragraph.

"4. Defendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 4.

"5. Defendant admits.

"6. Defendant admits that on and prior to January 13, 1998, he was an attorney for Plaintiff Skeeter Enright et. al. v. CGH Medical Center et. al., Case No. 96C50224, United States District Court, Northern District of Illinois, Western Division. Defendant denies each and every other allegation.

"7. Defendant admits that a person identifying herself as Tammy S. Jones did attend a deposition arranged for by counsel for Defendants in Enright et. al. v. CGH Medical Center et. al., 96C50224, United States District Court, Northern District of Illinois, Western Division at the offices of Ward, Murray, Pace & Johnson, attorneys for Defendant CGH Medical Center and other defendants IN 96c50224. Defendant herein has no knowledge sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

"8. Defendant denies.

"9. Defendant denies.

"10. Defendant denies.

"11. Defendant denies.

"One or the other of the following defenses constitutes a complete defense to the second amended complaint.

I.

"For a first defense to second amended complaint, Defendant alleges:

"1. The alleged cause of action set forth in the second amended complaint is based on 225 ILCS §415/1 et. seq., Statutes of the State of Illinois.

"2. The cited statute, especially that part of it designated section entitled §415/28 Payment for Services, is unconstitutional for the individual or collective reasons that a) it is overly broad; b) vague; c) violates the separation of powers between the legislative and judicial branches of the government of the State of Illinois and d) unconstitutionally usurps the power of the Illinois Supreme Court to administer and issue

rules as set forth in Article 16 of the Illinois Constitution for governance of court.

". The Illinois Supreme Court in Supreme Court Rule 208 has provided at time relevant herein that only the party at whose instance the deposition is taken shall pay the charges of the recorder or stenographer for attending and a party at whose request a deposition is transcribed and filed shall pay the charges for transcription and filing.

II.

"For a second defense to the second amended complaint Defendant alleges Plaintiff Doris Kennay, individually, has not complied with the conditions precedent of the statute (225 ILCS §415/1 et. seq.) in that Plaintiff Doris Kennay 1) has not complied with or certified the correctness of any alleged transcription or rendition of services in accordance with 225 ILCS §415(a)(20) and 2) has not complied with 225 ILCS §415/26 to state a valid cause of action under 225 ILCS §415/1 et. seq.

III.

"For a third defense to the second amended complaint Defendant alleges Plaintiff In Totidem Verbis, has not complied with the conditions precedent of the statute (225 ILCS §415/1 et. seq.) in that it 1) has not complied with or certified the correctness of any alleged transcription or rendition of services in accordance with 225 ILCS §415(a)(20); 2) has not complied with 225 ILCS §415/26 to state a valid cause of action under 225 ILCS §415/1 et. seq.; and 3) does not have filed in Ogle County, as it alleges, any assumed name for doing business at 8991 South Prairie Road in City of Ashton, County of Ogle, State of Illinois.

IV.

"For a fourth defense to the second amended complaint Defendant alleges in the alternative to the second and third defense stated above, Defendant is not liable under 225 ILCS §415/1 et. seq. as any payment by Defendant would be contrary to 225 ILCS §415/23(a)(11) in that since to Defendant's knowledge

Plaintiff Doris J. Kennay was not personally present on January 13, 1998 at the deposition set forth in her second amended complaint Plaintiff Kennay by virtue of subpart (11) is prohibited from directly or indirectly receiving from any person any fee, commission, rebate or other form of compensation for professional services she did not actually or personally render. As set forth in said Act, every shorthand reporter shall print his or her name and license number on each transcript reported, 225 ILCS §415/26, and Plaintiff Kennay's number has not been alleged to have been on the transcript claimed to be basis for second amended complaint.

V.

"For a fifth defense to the second amended complaint Defendant alleges Plaintiff Doris Kennay is estopped from claiming one Tammy Jones personally performed the services upon which she can base her claim since she had made a judicial admission in her first amended complaint that it was she who "attended and transcribed the said two depositions at a location with the County of Whiteside, State of Illinois (First Amended Complaint, paragraph 5, page 2.) The first amended complaint then goes on to claim Defendant is liable to Doris Kennay for her personal attendance and production of a transcript document.

VI.

"For a sixth defense to the second amended complaint Defendant alleges Plaintiff Doris Kennay and In Totidem Verbis are estopped from claiming there is a valid debt owed to them by Defendant since neither verified the claimed debt after claiming the existence of said debt under 15 U.S.C. §1601 et. seq. Prior to January 18, 1999 Plaintiff Kennay caused and authorized Mr. Robert G. Cooper II of Boca Raton, Florida, a collection agency, to write a letter dated January 18, 1999 to Defendant claiming a debt owed to In Totidem Verbis Crt Rptr, but not claimed to be owed to Plaintiff Doris Kennay as an individual court reporter. In accord with the provisions of 15 U.S.C. §1601 et. seq. Defendant by letter dated

January 23, 1999 to the same said Mr. Cooper disputed the debt owed existed. Affiant received no verification to validate the claimed debt. Said letters referenced in this Defense VI are in the record as attachments to Defendant's Motion to Dismiss filed April 19, 1999 in the instant action and are incorporated herein by reference.

VII.

"For a seventh defense to the second amended complaint, in the alternative, should there be found, any contract found in favor of Plaintiff(s) is void because not in compliance with the disclosure requirements of 15 U.S.C. §1601 et. seq.

"Consequently, Defendant DONAN B. McAULEY prays for judgment dismissing the second amended complaint and for his costs of this action.

DONAN B. McAULEY, Defendant
/s/ Donan B. McAuley

COUNTERCLAIM

"Now comes DEFENDANT DONAN B. MCAULEY, who does allege the following:

"1. Plaintiff Doris Kennay is a person defined in 15 U.S.C. §1602 (d).

"2. Plaintiff Doris Kennay is a creditor as defined in 15 U.S.C. §1602(f).

"3. Plaintiff Doris Kennay prior to her asserting a claim that a personal debt was owed to her by Defendant Donan B. McAuley as alleged in 99SC682ST did not disclose to Defendant Donan B. McAuley in writing or otherwise prior to the claimed effective date of the transaction all the charges for the claimed debt, including but not limited to, "late charges" which were allegedly to apply to late charge to all accounts unpaid after 30 days at a rate of 1.5% per month or $2.00 minimum.

"4. Plaintiff Doris Kennay sought to impose said "late charge" on Defendant Donan B. McAuley which meets the definition of a "finance charge" as set forth in 15 U.S.C. §1601 et. seq., including but not limited to 15 U.S.C. §1605(a)(1) and (2).

"5. Plaintiff Doris Kennay was and is asserting a "credit sale" as said term is defined in 15 U.S.C. §1602(g).
"6. Plaintiff Doris Kennay has at relevant times offered those to whom she claims a debt is due the opportunity to pay in installments which may equal or exceed four or more installments.
"7. Plaintiff Doris Kennay has a clear and consistent practice of attempting to assess and collect a finance charge as designated a "late charge" on her invoices with no disclosure to consumer that the charge was interest calculated at a minimum rate of 18 per cent per annum.
"8. Plaintiff Doris Kennay at no relevant time obtained the agreement of Defendant Donan B. McAuley to the assessment of any monetary sum, fee, finance charge, late fee, time price differential, or any amount payable under a system of additional charges in conformance with law.
"9. The conduct of Plaintiff Doris Kennay has been and is contrary to rights afforded Defendant under 15 U.S.C. §1601 et. seq.
"WHEREFORE, Defendant DONAN B. MCAULEY prays for a judgment in his favor that any contract found by the court to be in existence between Plaintiff Doris Kennay and Defendant is null and void in its entirety or voidable at option of Defendant and that Defendant be awarded damages in minimum of $1,000 statutory penalty as provided by 15 U.S.C. §1601 et. seq. plus attorney fees and costs incurred.

DONAN B. McAULEY, Defendant
/s/ Donan B. McAuley"
(Certificate of Service, redacted)

2. State of Illinois
In the Circuit Court of the 14th Judicial Circuit,
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.

Donan B. McAuley
Defendant
Defendant's Request for Production of Documents
Filed August 16, 1999

"Defendant DONAN B. MCAULEY, pro se, pursuant to Order of Court under Supreme Court Rule 287, requests Plaintiff DORIS J KENNAY individually and d/b/a IN TOTIDEM VERBIS produce for inspection and copying by Defendant the following documents at the offices of Donan B. McAuley, Suite 415, 1800 3rd Avenue, Rock Island, Illinois, within 30 days of service of this document, or on such earlier date as may be agreed upon. The instructions and definitions to be utilized in complying with this request are:

INTRODUCTORY STATEMENTS AND DEFINITIONS

"A. The word "identify" when used in Production of Document request with respect to an individual means to state the name, present business affiliation, business address and home address of the person.

"B. The word "identify" when used with respect to an entity, organization or partnership means to state the name of the entity, organization, or thing, the address thereof, the business thereof, and, if a partnership, each partner is to be identified.

"C. The word "identify" when used in Request for Production of Document pertaining to a conversation or other verbal communication means any document which would include without limitation:

"a. the date;

"b. the persons present;

"c. the persons speaking;

"d. the length of time engaged in said conversation;

"e. the place or location of the conversation;

"f. and if any written document was made concerning the fact of or contents of the conversation.

"D. This Request for Document Production is intended to be as inclusive as possible, and the inclusive reading should be used in interpreting the Request rather than the exclusive. Any reference to "Plaintiff" shall include

any person or entity set forth as a Plaintiff in 99 SC 682ST.

"E. Whenever appropriate in this Request for Document Production, the singular form or word shall be interpreted as plural.

"F. The word "and" as well as the word "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of this Request for Document Production any information which might otherwise be construed to be outside its scope.

"G. With respect to any answer, communication, or document which the Defendant (sic) seeks to withhold on claim of privilege, provide a statement signed by the attorney representing the Plaintiff setting forth as to each such answer, communication, or document:

"a. brief description of the nature and subject of the document or communication;

"b. the statute, rule, or decision which is claimed to give rise to the privilege.

"H. When the word "you" is used in these Interrogatories it refers to the person to whom this Production of Document Request is directed which is indicated by the name following the word "TO" immediately following the caption and includes without limitation any officer, agent or supervisor of any named entity or corporation, its attorneys, investigators, or experts.

"I. "Person" includes, without limitation, a natural person or persons, corporations, association, partnership, governmental agency, and any other entity of every nature and type.

"J. If any document responsive to any request has been lost, mutilated, or destroyed, so state and identify each such document, and state to which request(s) the document would have been responsive.

"K. If there are no documents in your possession, custody or control which are responsive to a particular request, so state and identify such request.

"L. Any document responsive to any request should be identified as being responsive to the specific request

involved. If the same document is responsive to more than one request, all requests to which it is responsive should be identified.

"M. The time period covered by this Request is January 1, 1998 through the present, unless otherwise specified.

"N. All requests should be considered continuing in nature as governed by the Supreme Court Rules, State of Illinois.

"REQUEST NO. 1

All documents that identify the nature of any relationship between you (Plaintiff) and the person identified as Tammy Jones in the Second Amended Complaint including but not limited to:

1. W-2 tax and income reporting forms
2. 1099 tax and income reporting forms (or equivalent)
3. Documents showing any U.S. currency or monetary equivalents such as checks, drafts, vouchers, etc. being given by Plaintiff to said Tammy Jones or the receipt of any U.S. currency or monetary equivalents. Payment in kind is included as a US currency equivalent.

REQUEST NO. 2

The employee personnel file of Tammy Jones as the person identified in Plaintiff's Second Amended Complaint you (as defined above) kept.

REQUEST NO. 3

All invoices or statements or documents of any kind Plaintiff sent to persons or organizations with whom existed a Plaintiff claim for stenographic reporting and Plaintiff referenced there was due to Plaintiff any "late charge", finance charge, interest, time delay payment or charge of any kind not incurred on the date the stenographic reporting services were rendered.

REQUEST NO. 4

All federal and state income tax documents, including supporting schedules, wherein you (Plaintiff) claimed any income or expense attributed to stenographic services personally performed by the person identified

as Tammy Jones in Plaintiff's Second Amended Complaint.

REQUEST NO. 5

All documents from January 1, 1997 to the present either sent to you or received by you (as defined above) from any attorney or other person on behalf of any attorney at Ward, Murray, Pace and Johnson, Sterling, Illinois, related to any deposition claimed by Plaintiff in her Second Amended Complaint to be the basis for the liability of Defendant to Plaintiff.

REQUEST NO. 6

All documents upon which you as Plaintiff relies on to support Plaintiff's claim of reasonable stenographic fees and costs.

REQUEST NO. 7

All documents in possession and custody of you (Plaintiff) related to your allegations as set forth in Paragraphs 1,2, 3 and 4 of your Second Amended Complaint.

REQUEST NO. 8

All documents in possession and custody of Plaintiff that relate to the claimed "agency" existing between Plaintiff and the person identified as Tammy Jones in the Second Amended Complaint.

REQUEST NO. 9

All documents in your (Plaintiff) possession and custody identifying any insurance coverage paid for by you (Plaintiff) relating to the person identified as Tammy Jones in the Second Amended Complaint to include, but not be limited to, worker compensation coverage, unemployment insurance, social security (including Medicare) payroll deductions (FICA), professional liability coverage, omissions and acts coverage, motor vehicle coverage or riders or any coverage where the person identified as Tammy Jones in the Second Amended Complaint was covered as an insured.

DEFENDANT DONAN B. MCAULEY

/s/ Donan B. McAuley"

3. State of Illinois
In the Circuit Court of the 14th Judicial Circuit,
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.
Donan B. McAuley
Defendant
Relevant entries in Court Docket
"5/18/99 - 2. Defts. 2-615 motion allowed.
"7/12/99 – (Deft) 2-615 Mt allowed. Deft has shown proof that someone other than Plaintiff provided Ct Reporting services & proof does not comply w/allegations of complaint. Nor is there allegation that "Tammy Jones" is Employee of Plaintiff lst Am complaint stricken.
"7/26/99 - Second Amended Complaint filed.
"8/16/99 - Defendant motion for leave to propound request for production of documents filed. Answer and counterclaim filed. Notice pursuant to Rule 19 of defendant claim of statue's unconstitutionality filed. Defendant's request for production of Documents is denied.
"9/21/99 – Motion to Dismiss Counterclaim filed.
"9/27/99 – Plaintiff Mtn to Strike Aff Def & Dismiss Counterclaim allowed.
"10/22/99 – Plaintiffs motion to quash subpoena as is related to documents to be provided is allowed."

4. Letterhead of Adams Cooper and Marks
Dated Fri Jan 22 1999 to:
"In Totidem Verbis Crt Rptr 14230 Page 1
8991 South Prairie Road
Ashton IL 61006
Att; Ms. Doris Kennay
Phone 815/453-2260 Fax: 815/453-2260
We augment our formal acknowledgement of the account(s) listed below.

Collection efforts have already begun with the highest possible degree of efficiency.

If payment is made directly to you, please notify the undersigned immediately.

Thank you for selecting our firm to satisfy your financial needs and we will do everything possible to continue to earn your trust.

NAME	FILE #
McAuley Esq., Donan B.	89630-85437
AMOUNT	ASSIGNED
762.01	1/18/99
NUMBER ASSIGNED	AMOUNT ASSIGNED
1	762.01

Adams Cooper & Marks
By /s/ Marvin Popech"

5. Payroll Worksheet maintained by Doris Kennay
Reporter s/Tammy
"1/3/98 Enright $149.60
1/3/98 Proulx $141.05
* * * *
Less copy on (unreadable) taken 10/7/97. Attorney never paid so copy not sent. -130.40"

6. Personal Bank Check
Account of Doris Kennay #2787 at Amcore Bank
"Payable to Tammy Jones $1382.67 s/Doris J. Kennay dated 2/6/98." Said total matches #5 worksheet above.

7. United States District Court for
Southern District of Iowa, Davenport Division
"Donan B. McAuley
Plaintiff
v.
Goodman et. al.
Defendants

No. 3-99-CV-10151

Filed April 11, 2001

"Defendants Statement of Interest

"As required by LR 3.2 and LR 81.1©, (d), and (e), Adams, Cooper & Marks, a business entity, defendant in this case, provides the following information to the court:

"(a) The following are the names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the defendant as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the defendant's outcome in the case:

"Adams, Cooper & Marks, Inc., a Minnesota corporation. I.C. System, Inc., a Minnesota corporation. Adams, Cooper & Marks, Inc. has an assumed name filing in Minnesota and Florida to do business as Adams, Cooper & Marks.

"(b) With respect to each entity named in response to (a), the following describes its connection to or interest in the litigation, or both:

"Adams, Cooper & Marks, Inc. is a Minnesota corporation owned entirely by I.C. System, Inc., a Minnesota corporation.

/s/Arthur L Buzzell
Arthur L. Buzzell, attorney for
defendant Adams, Cooper & Marks"

8. State of Illinois
In the Circuit Court of the 14th Judicial Circuit
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.
Donan B. McAuley
Defendant

Transcript of Trial Testimony on October 25, 1999
"at Tr. page 81 –

"Q. On January 13th of 1998, was – or did In Totidem Verbis have an assumed business name filing with Ogle

County stating that you were in business at 8991 South Prairie Road in Ashton, Illinois?

"MR. MERTES: Objection. Irrelevant.

"THE COURT: Sustained.

"MR MCAULEY: Your Honor, I believe it is relevant. it goes to credibility.

"THE COURT: Sustained, Mr. McAuley. Sustained. We've talked about this before, Mr. McAuley. The record should reflect that Mr. McAuley has raised this issue with regard to the assumed business name, and the court has made rulings – pretrial rulings on this matter previously. That's the reason why it's irrelevant and the reason for the court's ruling.

"MR MCAULEY: Your Honor, I would like to make an offer of proof that it's also relevant to the Illinois Court Reporter Act 225 Illinois 415 – and I understand it's arguing, but I think it's relevant to that statute brought up by the witness.

"THE COURT: Thank you, Mr. McAuley. The request for offer of proof is denied."

9. State of Illinois
In the Circuit Court of the 14th Judicial Circuit
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.
Donan B. McAuley
Defendant

Transcript of Trial Testimony on October 25, 1999

"At Tr. page 182 –

"Another judge, specifically Judge DePorter, made a ruling with regard to Mr. McAuley's request for production. That ruling was denied. Many of the things that were requested in that request for production found themselves in subpoena duces tecum. Rule 237 provides that those items previously

discovered could be requested in a Rule 237 subpoena duces tecum. That fact that there was no such prior discovery allowed specifically and a specific request for production shows up in a request – in a subpoena duces tecum is, to this court, a clear violation of Rule 237."

10. State of Illinois
In the Circuit Court of the 14th Judicial Circuit
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.
Donan B. McAuley
Defendant
Transcript of Trial Testimony on October 25, 1999
"At Tr. page 87-88 –
"Q. (to Doris Kennay) Did you hire Adams, Cooper & Marks to collect from Mr. McAuley for the debt you claim he's liable for for the January 13, 1998, depositions?
"MR. MERTES: Objection. Irrelevant.
"THE COURT: Mr. McAuley, who is the firm that you're referring to?
"MR. MCAULEY: It's a debt collection agency that was hired by Ms. Kennay. She testified about collection efforts. I'm just calling upon her response –
"THE COURT: That would be the Boca Raton firm?
"MR MCAULEY: Yes.
"THE COURT: Is that correct?
"MR MCAULEY: Yes.
"THE COURT: objection is sustained. The court has previously dealt with that issue in regard to that firm in another context, and I believe that, at this point in time, it is irrelevant."

11. State of Illinois
Appellate Court Third District
Doris J. Kennay, individually

and d/b/a In Totidem Verbis No. 3-99-0951
Plaintiff-Appellee
v.
Donan B. McAuley
Defendant-Appellant
Appellant Brief Filed March 6, 2000
Pages 17 to 18

"B. Sanctions.

"The trial court abused its discretion in denying sanctions pursuant to Rule 137 on September 27, 1999 (C-3). Supreme Court Rule 137 in pertinent part states:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonably inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

"Kennay's counsel could not pretend the law favors his position and force the court or opposing party to determine that established law is against the advocate. *Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989).*

"Kennay's counsel position evidenced he had not even read the applicable statute referenced in the counterclaim, 15 U.S.C.§1601 at §1640(e). (C-143). (case citation omitted).

"The trial court just dismissed this public, consistent, statutory and case authority directly and convincingly disputing Kennay counsel's bald assertion of no court jurisdiction.

"With such overwhelming evidence it could not in any fashion be held that Kennay's counsel had made any inquiry before he signed such an erroneous motion. The conduct of Kennay's counsel is what Rule 137 is to prevent.

"There is no Kennay counsel affidavit or other evidence that he made any inquiry before asserting an unsupported lack of jurisdiction by the trial court. There was not even argument to modify existing clear statutory language and supporting case authority.

"For the trial court to deny the motion would have required there to be a reasonable basis for Kennay's stated no jurisdiction position. There exists no evidence for this Appellate Court to uphold the trial court's order of dismissal or denial of sanctions for Kennay counsel."

12. In Totidem Verbis Letterhead
Invoice 98-TJ- &9 Date 1-21-98
"Bill to: Attorney Donan B. McAuley (address)
I.D. Number Day Taken
36-3230326 1/13/98
RE: Enright v CGH Medical Center .
(listing of specific charges redacted)
6/1/98 thru 1/4/99 Late Charges $65.11
Late charge applied to all amounts unpaid after 30 days at a rate of 1.50% per month or $2.00 minimum.
Total due $762.01"

13. Affidavit of Defendant McAuley
Dated September 27, 1999
Filed September 27, 1999
"State of Iowa
County of Scott
"This is to certify that the attached one page document identified in page heading as Ch41 Consumer Credit, 15 §1640, pages 664 (right column) and 665 is a true and accurate copy of the identical page(s) contained in the United States Code Annotated volume containing the Federal Truth in Lending Law, 15 §1601 et seq., as present and maintained in the Rock Island County Law Library on September 16, 1999.

/s/ Donan B. McAuley
Notary Public

My commission expires Feb 14, 2000"
(Attached page from referenced US Code Annotated not included as hard to reproduce, but contained listing of cases in state court where state court jurisdiction acknowledged.)

14. State of Illinois
In the Circuit Court of the 14th Judicial Circuit
Whiteside County
Doris J. Kennay, individually
and d/b/a In Totidem Verbis No. 99SC682ST
Plaintiff
v.
Donan B. McAuley
Defendant
Written Defendant Argument Filed and Accepted
By Trial Court at Trial on 10/25/99
"In Totidem Verbis, as an entity of sole proprietorship, has no standing to bring any lawsuit under Illinois Certified Shorthand Reporters Act of 1984 (hereinafter "Act").
"Under the Act, "[n]o person may practice shorthand reporting on a temporary or permanent basis in this State without being certified under this Act." §415/3.
"And, "No person shall, after the effective date of this Act, begin to practice in this State or hold himself out as being able to practice shorthand reporting unless he is certified in accordance with the provisions of this Act." §415/12.
"The Act denies compensation to uncertified reporters and in explicit language states "No action or suit shall be instituted, nor recovery therein be had, in any court of this State by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this Act to other than certified shorthand reporters." §415/13.
"The key word used consistently throughout the Act and consistent with all references is that all Act

references to "person" means a human being, not a business entity.

"This construction is supported throughout the Act, especially in the following sections:

"*§415/4(5) definition of shorthand reporter means a person technically qualified and certified. No provision of the Act provides that a business entity is certifiable as an entity.

"*In fact, provisions of the Act make it impossible for an entity to meet the conditions of qualification as set forth in §415/11. No entity can be convicted of a felony, graduate school, or successfully complete an examination. Only a human being can meet the Act's conditions of qualification and thus be certified.

"*In Totidem Verbis is not a certificate holder nor registered as required by §415/18.

"*The only Act reference to a business entity is limited in §415/20 where a certificate holder is not restricted from forming a professional service corporation. However, the Act does not grant any such professional service corporation any right to bring an action in its own right.

"*A business entity is incapable of meeting the continuing education requirements of §415/27 or the competency requirements of §415/9.

"That a business is not recognized under the Act as a person and is incapable of holding a certificate the business entity thus does not in its own right have standing to bring a lawsuit under the Act because a business entity is not a "certified shorthand reporter" as defined in the Act and as not a "certified shorthand reporter" it is barred by §415/13 from bringing any action or suit. Therefore, as not authorized to bring an action or suit under the Act, it has no authority or standing to invoke §415/28 relating to payment for services since that provision applies only to a natural person who is certified as a shorthand reporter under the Illinois Certified Shorthand Reporters Act of 1984, 225 ILCS 415/1 et. seq.

"Doris Kennay as an Individual Has No Standing to Invoke the Illinois Certified Shorthand Reporters Act of 1984 other than for Services Personally Performed.

"Doris Kennay, assumed to have a valid certificate in shorthand reporting on or about January 13, 1998, under the Illinois Certified Shorthand Reporters Act of 1984 (hereinafter "Act") has no standing under the Act to be personally compensated for shorthand reporting services not personally performed.

"For shorthand services to be performed under the Act requires the reporting by the use of any system of manual or mechanical shorthand writing. §415/4(4). this is the production of stenographic notes which are defined under the Act in §415/4(6) as "Stenographic notes" means the original notes by manual or mechanical shorthand or shorthand writing taken by a shorthand reporter of a proceeding while in attendance at such proceeding for the purpose of reporting the same."

"This requirement of personal attendance is supported by the requirement in §415/26 that "Every shorthand reporter shall print his or her name and license or restricted license number on each transcript reported."

"If the person such as Doris Kennay who did not personally take the stenographic notes of the proceeding and did not fulfill the requirements of signature set forth in §415/26, that person is violating the provisions of the Act when attempting to claim compensation for services not personally performed. Such a claim is a prohibited act under the certified shorthand reporters Act and the Act provides in §415/13 that no action or suit shall be instituted nor recovery of compensation had for any services unless in compliance with the Act. The rationale is simple. If there is a lack of compliance with the provisions of the Act, no action or suit may be maintained by a person not in full and complete

compliance with the Act. To hold otherwise would defeat the public policy said by the legislature to justify the Act."

15. United States District Court
For the Southern District of Iowa
Davenport Division
Donan B. McAuley,
Plaintiff
v. No. 3-99-CV-10151
Goodman et. al.
Defendants. Filed November 22, 2000

Answer of Doris J. Kennay, individually,
d/b/a In Totidem Verbis

"Now comes Doris Kennay, individually, or d/b/a In Totidem Verbis, by her attorney Douglas C. Scovil of Ruud, Scovil & Marsh, and for her Response to the Complaint filed herein respectfully states and alleges as follows:

Count I

"Makes no answer to the same for the reason that no relief is sought against defendant, Kennay.

Count II

"Makes no answer for the reason no relief is sought against defendant, Kennay.

Count III

"1. Admits the allegations contained therein.

"2. Admits that a civil lawsuit was filed against plaintiff in Whiteside County, Illinois, in the Circuit Court of the Fourteenth Judicial Circuit, in a case entitled 99 SC 682 St, handled through the Sterling Division of the Whiteside County Court. The suit was filed therein for the reason that the subject matter of the aforementioned lawsuit related to depositions that were taken in Whiteside County. After filing the aforementioned lawsuit in Whiteside County, defendant Kennay delivered the papers to Stewart & Associates Inc. who does business at 302 1st Avenue, City of Sterling, County of Whiteside and State of Illinois. It is

unknown to plaintiff how services was effectuated upon defendant, but the return of service will speak for itself.

"3. Admits that counsel, in the First Amended Complaint, alleged that she personally attended and rendered services. However, her attorney cleaned that matter up in the Second Amended Complaint that was filed, in that it alleged that Tammy S. Jones did in fact personally perform the services (court reporting) for which recovery was sought from Mr. McAuley; and that Tammy S. Jones was an employee, servant, and agent of her principal and employer, Doris J. Kennay, individually, and also d/b/a In Totidem Verbis. Defendant does not have sufficient information to admit or deny the allegation as to what defendant's counsel represented to the Court on August 16, 1999.

"4. Denies the allegations contained therein and affirmatively states that trial was held on the case in Whiteside County on or about October 26, 1999 and, in the complaint that went to trial, no allegations were made seeking to recover finance charges.

"5. Denies the allegations contained therein and affirmatively states that the only contact defendant had with Adams, Cooper & Marks and Goodman began January 15, 1999 and ended March 10, 1999.

"6. Denies the allegations contained therein due to lack of information as the allegation is too general and is not specific enough to be able to address any specific disclosure that was supposedly due to have been made that was not made. Therefore, due to lack of specificity, denies the general allegation making reference to an entire statutory scheme.

"7. Denies the allegations contained therein.

"8. Denies the allegations contained therein.

"9. Denies the allegations contained therein and affirmatively states that Tammy S. Jones was an employee and was paid a salary for the work that was done by defendant, Kennay.

"10. Denies the allegations contained therein and, to the extent that any portion of this allegation relates to any allegations made in a law suit in Whiteside County,

states that said allegations were made upon advice of counsel as defendant, Kennay, hired an attorney to represent her in connection with said matters.

"11. Denies the allegations contained therein.

"12. Denies the allegations contained therein and affirmatively states that the small claims suit in Whiteside County took place in said county because that is where the depositions that were the subject of the law suit were taken by Tammy S. Jones, an employee of Doris Kennay, individually, and d/b/a In Totidem Verbis, denies the remainder of the allegations contained therein.

"13. Admits that the invoices forwarded to Adams, Cooper, Marks and Goodman from 1-15-99 to 3-10-99 contained finance charges in the total; denies the remainder of the allegations contained therein.

"14. Denies that plaintiff is entitled to recover any damages, fees, or costs, expungement of records, or other relief as sought in Paragraph 14.

Affirmative Defenses

"1. The Count that was the subject of collection was not for personal, family, or household purposes; therefore the Fair Debt Collection Practices Act does not apply to the same.

"2. This Court does not have subject matter jurisdiction.

"3. This Court does not have personal jurisdiction over defendant, Kennay.

"4. If this matter remains with this Court, this Court should stay these proceedings pending the outcome of the appeal from the Circuit Court of the Fourteenth Judicial Circuit, Whiteside County, Sterling Division, in Cause No. 99-SC632ST (sic), which was appealed to the Appellate Court of the Third Judicial District in and for the state of Illinois.

"Defendant prays that this Court award her reasonable attorneys fees and costs pursuant to 15 U.S.C. 1692K(3), or other applicable statutory provisions which may apply after hearing the evidence herein and

allowing any amendments to conform the pleadings to the proof at the time of trial.

DORIS KENNAY, One of Defendants
By /s/ Douglas C. Scovil

(Statement of Service of Answer redacted)

Supreme Court, U.S.
FILED
OCT 16 '02
OFFICE OF THE CLERK

No. 02-0417

In The

Supreme Court of the United States

DONAN B. MCAULEY,

Petitioner,

vs.

DORIS J. KENNAY, Individually and d/b/a IN TOTIDEM VERBIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari purports to identify the Illinois Supreme Court as a party to this proceeding. The Illinois Supreme Court is not properly designated as a Respondent to the Petition for Writ of Certiorari, in that the Illinois Supreme Court is not a party hereto.

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STATUTES

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STATEMENT OF THE CASE

The Illinois trial court and the Illinois Third District Appellate Court have each independently found that the Petitioner has abused judicial process and pursued frivolous litigation in this small claims cause of action. The Petitioner's Petition for Writ of Certiorari represents a continuation of that abuse.

The Petitioner is an attorney. The Respondent, Doris Kennay, Individually and d/b/a In Totidem Verbis, is a court reporter who owns a court-reporting agency which employs other court reporters.

On January 13, 1998, the Respondent, through one of her employees, attended and reported two discovery depositions which took place in connection with a federal lawsuit in which the Petitioner was counsel of record for the plaintiff. (R-14, 15, 16.) The Petitioner, as counsel for plaintiff, requested, scheduled and took the discovery deposition of an agent of the opposing party. (R-51, 53, 94.) Though testimony at trial was conflicting, the trial court found that the Petitioner ordered deposition transcripts from the Respondent, and thereafter received deposition transcripts from the Respondent. (R-150.) The Respondent thereafter refused to pay the Petitioner's bill for services and transcripts, in the total amount of $696.90.

The Respondent brought suit against the Petitioner in Illinois small claims court. (C-5.) The Petitioner filed various motions to strike, motions to dismiss and motions for summary judgment. (C-8 through C-20.) The Petitioner also filed a counterclaim against the Respondent, alleging that the Respondent had violated the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). (C-107 through C-114.) The trial court found and the Illinois Appellate Court affirmed that

there was no legal or factual basis for the Petitioner's claim that the Respondent had acted as a finance agency in a credit transaction, and therefore the Petitioner's counterclaim was dismissed. (C-3, Pet. App. 5., Resp. App. 1-11.)

On October 25, 1999, the trial court, after bench trial, expressly found that the Petitioner had, in fact, requested the transcription of one deposition and a copy of the transcription of another. The Court thereupon entered judgment in favor of the Respondent and against the Petitioner in the amount of $696.60 plus costs of suit. (R-152.)

The trial court then proceeded to hearing on the issue of whether sanctions should be imposed upon the Petitioner arising from his conduct with respect to the issuance and service of certain subpoenas duces tecum. (R-152.) During the announcement of its findings against the Petitioner, the trial court stated as follows:

> In the three years that I have been on the bench, almost three years, this has been, without a doubt, the most clear-cut example that I have ever encountered of burdensome proceedings in a small claims case, and in this instance, an abuse of the subpoena powers of the court.
>
> (R-183.)

The Petitioner then appealed from the judgment entered against him and from the dismissal of his counterclaim. On November 22, 2000, the Third District Appellate Court of the State of Illinois affirmed the trial court's rulings, and entered a further written order on its own motion, finding that the appeal was frivolous and remanding the case to the trial court. (Pet. App. 5, Resp. App. 1-

11.) Within that order, the Appellate Court instructed the trial court to conduct a hearing for the purpose of determining the Respondent's reasonable costs and expenses on appeal, including attorney fees, and to order the Petitioner to immediately reimburse the Respondent for the same. (Pet. App. 5.)

The Petitioner then filed a Petition for Leave to Appeal to the Illinois Supreme Court, therein seeking to challenge the Appellate Court's affirmation of the judgment below, and the Appellate Court's summary imposition of sanctions. The Illinois Supreme Court denied the Petition for Leave to Appeal as to the judgment below, but entered a supervisory order vacating the Appellate Court's summary imposition of sanctions, and directing the Appellate Court to require the Petitioner to show cause why sanctions should not be imposed, and to set forth the reasons and basis for the sanctions if thereafter imposed. (Resp. App. 1.)

On May 17, 2001, the Illinois Third District Appellate Court entered an order vacating its November 22, 2000 summary imposition of sanctions against Petitioner, and ordering the Petitioner to show cause as to why sanctions should not be imposed upon him for filing a frivolous appeal. (Pet. App. 6.) Within its May 17, 2001 order, the Illinois Third District Appellate Court adopted, as its factual findings, the issue as set forth within the Respondent's appellate brief. (Pet. App. 6.) Within its relevant part, that issue was stated as follows:

> In the case at bar, a reasonable, prudent attorney simply would not have conducted himself as did the [Petitioner]. This case began as a pro se court reporter's simple attempt to collect approximately $700.00 in money owed to her for services

> and transcripts ordered by the attorney [Petitioner]. Since then, the [Petitioner] has abused judicial process and bullied the [Respondent] with an onslaught of pleadings and procedural machinations. This case now provides the court with an important opportunity to protect an aggrieved litigant and an abused judicial system from further procedural frivolity which might otherwise be waged by the [Petitioner].

The Petitioner thereafter filed his brief with the Illinois Third District Appellate Court, therein setting forth the reasons why he believed that sanctions should not be imposed against him.

On July 17, 2001, the Illinois Third District Appellate Court entered its written opinion, therein stating, in relevant part, as follows:

> Taken as a whole, the [Petitioner's] appeal was patently frivolous and brought for improper purposes.
>
> (Pet. App. 6 through 8.)

The Petitioner then filed yet another Petition for Leave to Appeal to the Illinois Supreme Court, this time challenging the Illinois Third District Appellate Court's July 17, 2001 order finding that his appeal was "patently frivolous and brought for improper purposes." (Pet. App. 6 through 8.) The Illinois Supreme Court denied the Petitioner's second Petition for Leave to Appeal. The Petitioner has now filed his Petition for Writ of Certiorari, seeking to challenge not only the sanctions imposed against him, but also the order dismissing his counterclaim.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. The issues raised by Petitioner are not compelling.

United States Supreme Court Rule 10 provides, within relevant part, that "a petition for writ of certiorari will be granted only for compelling reasons." In the instant case, the reasons for granting the petition for writ of certiorari are certainly not compelling. Rather, the petition for writ of certiorari arises from the Petitioner's dissatisfaction with rulings made against him in a small claims matter which initially entailed an amount in controversy of less than $700.00.

The issues raised within the Petition for Writ of Certiorari, though couched in terms of presenting some federal question, are in reality nothing more than challenges made to the factual findings of the Illinois courts. Both the Illinois trial court and the Illinois appellate court separately found that the Petitioner's conduct in this case was "frivolous," and an "abuse of process."

The various acts of misconduct by the Petitioner, resulting in the repeated imposition of sanctions against him, are indeed quite disturbing. Sanctions were certainly necessary and appropriate as a remedy for such an ongoing abuse of judicial process. However, the manner in which such sanctions were imposed certainly does not present any issue so important that it must be addressed by the highest Court of the United States. Though the prevention of such abuse is certainly an important objective of our justice system, its occurrence in the instant case is absolutely not "compelling," as that term is defined within the letter and spirit of Rule 10.

2. The state court properly dismissed the Petitioner's counterclaim.

Among the multitude of his other procedural machinations, the Petitioner filed a counterclaim alleging that the Respondent was liable to him for damages arising from Respondent's purported violations of the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). The appellate court found as a factual matter that the Respondent was not a finance agency in a credit transaction, and therefore the Truth in Lending Act is inapplicable. Since the Petitioner's arguments are therefore based upon an issue of fact, no issue of law is presented for the Court to address.

The Petitioner contends that the dismissal of his counterclaim was a "miscarriage of justice," because, according to Petitioner, the lower courts improperly found that Illinois state courts lack jurisdiction to decide the federal issue presented within his counterclaim. Petitioner's argument is based upon a misstatement of the record. The Appellate Court held that because the Respondent is not a finance agency in a credit transaction, the Truth in Lending Act does not apply. Accordingly, though Petitioner states otherwise, the counterclaim was dismissed based upon a factual determination. The Petitioner therefore does not present an issue of law.

3. The Illinois Third District Appellate Court properly imposed sanctions against the Petitioner.

Though the Illinois Third District Appellate Court afforded to the Petitioner fair notice and a reasonable opportunity to show cause as to why sanctions should not be imposed against him, the Petitioner now argues that he did not receive adequate notice of the conduct for which

the state appellate court was considering sanctions. The appellate court adopted, as its findings, those statements set forth within the Respondent's responsive brief to the appellate court. Essentially, the appellate court adopted the finding that "a reasonable, prudent attorney would not in good faith have brought such an appeal." The appellate court then afforded to the Petitioner a reasonable opportunity to file a brief setting forth the reasons why sanctions should not be imposed against him. Though the Petitioner thereupon filed a brief, the Appellate Court found that the arguments of the Petitioner were "specious" and that his appeal was "patently frivolous and brought for improper purposes."

Again, though he characterizes it differently, the gist of Petitioner's argument is that he does not agree with the factual determinations made by the lower court. Since the Petitioner's arguments are therefore based upon issues of fact, no issue of law is presented for this Court to address.

CONCLUSION

The Respondent respectfully requests that the Court shall deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel of Record for Respondent

APPENDIX

B. OPINIONS AND JUDGMENT BELOW

1. Letterhead of Supreme Court of Illinois

To: Mr. John [sic] W. Mertes
Pignatelli, Liston & Mertes, P.C.
Canal Plaza Office Center
102 East Route 30
Rock Falls, IL 61071

No. 90797 – Doris J. Kennay etc., respondent, v. Donan B. McAuley, petitioner. Leave to appeal, Appellate Court, Third District.

"The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause and entered the enclosed supervisory order. The mandate of this Court will issue to the Appellate Court on April 26, 2001.

No. 90797 – SUPERVISORY ORDER

In the exercise of this Court's supervisory authority, the Appellate Court, Third District, is directed to vacate its order in Kennay v. McAuley, case No. 3-99-0951 (November 22, 2000), imposing sanctions upon appellant pursuant to Rule 375. The appellate court is ordered, pursuant to Rule 375, to require the appellant to show cause why the sanctions should not be imposed, and to set forth the reasons and basis for the sanctions if imposed."

2. November 2, 2000 Order of the Third District Appellate Court

ORDER

The Defendant in this small claim action, Donan G. McAuley, appeals the Whiteside County circuit court's judgment in favor of the plaintiff, Doris J. Kennay, d.b.a. In Totidem Verbis, for the amount of $696.60 plus the costs of suit. This court will address the following questions: (1) Is the Illinois Certified Shorthand Reporters Act of 1984 (Act) (225 ILCS 415/1 *et seq.* (West 1994)) constitutional? (2) Did the circuit court err when it dismissed defendant McAuley's counterclaim? (3) Did the circuit court abuse its discretion when it denied the defendant's request for sanctions against the plaintiff? (4) Did the circuit court abuse its discretion when it denied the defendant's request for pre-trial discovery? (5) Did the circuit court fail to base its judgment on the evidence adduced at trial? Because the circuit court concluded properly on all issues, we affirm.

FACTS

The Plaintiff, Doris J. Kennay, individually and d.b.a. In Totidem Verbis (Kennay), is an Illinois certified shorthand reporter. Kennay employed Tammy Jones as a shorthand reporter on January 13, 1998. The defendant, Donan McAuley, is an attorney, upon whose request, Jones, as Kennay's employer, attended and reported two discovery depositions in a federal case. At the deposition, McAuley represented one of the deponents and deposed the other deponent. According to Ms. Jones, after the deposition, she asked McAuley whether she should prepare transcripts for him of the two depositions. He responded by requesting a copy of his client's deposition transcript and an original transcript of the other deposition. McAuley, however, presented testimony indicating that he did not respond to Jones regarding his client's deposition, but rather allowed

his client to request a copy of her deposition transcript. Later by telephone, McAuley requested that Kennay not expedite the transcripts, but send them by regular mail with no copy of exhibits attached to one of the depositions. Kennay thereafter sent the transcripts via certified mail to McAuley with a bill for the amount of $696.90, which McAuley refused to pay. Kennay then filed her small claim complaint. McAuley answered the complaint and additionally counterclaimed, alleging Kennay had failed to comply with the federal Truth in Lending Act (15 U.S.C. 1601 *et seq.*). The circuit court, however, granted Kennay's subsequent motion to dismiss the defendant's counterclaim. Ultimately, based upon its express finding that McAuley had requested the deposition transcriptions, the circuit court entered judgment in favor of Kennay for $696.60 [sic] plus the costs of suit. McAuley now appeals.

ANALYSIS

Is the Illinois Certified Shorthand Reporters Act of 1984 (225 ILCS 415/1 *et seq.* (West 1993)) constitutional? McAuley argues that the Illinois Certified Shorthand Reports Act (Act) is unconstitutional because it (1) is overbroad and vague; (2) is special interest legislation; (3) violates the single-subject rule; (4) conflicts with Illinois Supreme Court Rule 208; and (5) is not severable. In response, Kennay contends that (1) McAuley waived his special interest legislation and single subject rule arguments when he failed to preserve the issues; (2) McAuley lacks standing to claim that sections 12 and 13 of the Act are unconstitutionally overbroad and vague; and (3) the Act is not contrary to Supreme Court Rule 208.

Our review of the constitutionality of the statute is *de novo*. *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, 420, 665 N.E.2d 795 (1996). "It is well-settled that, to preserve an issue for review, a defendant must both contemporaneously object and raise the issue in a post-sentencing motion." *People v. Nielson*, 187 Ill.2d 271, 196, 718 N.E.2d 131, 147 (1999). We agree with Kennay's contention that McAuley did not meet the requirements and, thus, failed to preserve his claims regarding special legislation and the single subject rule. Consequently, we deem them waived.

Next, we consider whether McAuley lacks standing to assert that sections 12 and 13 of the Act are unconstitutionally overbroad and vague. Section 12 states, in pertinent part,

> "no person shall * * * begin to practice in this State or hold himself out as being able to practice shorthand reporting unless he is certified in accordance with the provisions of this Act." 225 ILCS 415/12 (West 1994).

Moreover, section 13 provides, in relevant part,

> "no action or suit shall be instituted, nor recovery therein be had, in any court of this State by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this Act to other than certified shorthand reporters." 225 ILCS 415/13 (West 1994).

"To have standing to challenge the constitutionality of a statute, one must have sustained or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute." *Chicago Teachers Union,*

Local 1, 189 Ill.2d 200, 206, 724 N.E.2d 914, 918 (2000). At bar, the circuit court considered section 28 of the Act in determining McAuley's responsibility for payment of the shorthand reporting services rendered and did not consider sections 12 and 13 of the Act. As sections 12 and 13 are irrelevant to the controversy at issue, McAuley was not in danger of sustaining any injury as a result of the enforcement of these sections as such sections. We, therefore, conclude that McAuley lacks standing to challenge sections 12 and 13 on appeal.

In addressing McAuley's contention that section 28 of the Act conflicts with Illinois Supreme Court Rule 208, we note section 28:

> "A person certified under this Act may hold an attorney, firm, or any other entity personally responsible for payment of shorthand reporting services rendered at the request of that attorney, firm or entity." 225 ILCS 415/28 (West 1994).

Further, Rule 208 states, in pertinent part:

> "The *party* at whose instance the deposition is taken shall pay the fees of the witness and of the officer and the charges of the recorder or stenographer for attending. The party at whose request a deposition is transcribed and filed shall pay the charges for transcription and filing * * * " (Emphasis added.) 134 Ill.2d R 208.

Notwithstanding that the depositions were taken in a federal case pursuant to the U.S. Supreme Court Rules and not the Illinois Supreme Court Rules, we conclude that no conflict exists between section 28 of the Act and Rule 208. As the circuit court concluded, Rule 208 merely governs which side to litigation must pay for a deposition.

Unlike section 28 of the Act, Rule 208 does not govern whether an attorney can be held personally liable for the cost of a deposition that occurs at the attorney's insistence. Thus, McAuley's claim lacks merit.

Did the circuit court err when it dismissed McAuley's counterclaim? McAuley contends that the circuit court erred in granting Kennay's motion to strike his counterclaim since Kennay had not complied with the federal Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). Conversely, Kennay claims that, in addition to the state court's lack of jurisdiction on the federal issue, Kennay never conducted her business as a financial agency in a credit transaction.

Our review of the circuit court's disposition of a 2-619 motion is *de novo*. *Chicago Teachers Union, Local 1 v. Board of Education of City of Chicago,* 189 Ill.2d at 206, 724 N.E.2d at 918. We conclude that, because Kennay did not conduct In Totidem Verbis as a finance agency in a credit transaction, the Truth in Lending Act is inapplicable. See 15 U.S.C. § 1640(e). Thus, the circuit court properly granted the motion to strike.

Did the circuit court abuse its discretion in denying McAuley's request for sanctions against Kennay? McAuley contends that when Kennay's counsel signed the motion to strike McAuley's counterclaim without previously reading the Truth in Lending Act, upon which McAuley based his counterclaim, such signature violated Supreme Court Rule 137.

The decision to impose sanctions rests within the sound discretion of the circuit court. *Health Cost Controls v. Sevilla*, 307 Ill.App.3d 582, 718 N.E.2d 558 (1999). Rule 137 states, in pertinent part:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." 155 Ill.2d R. 137.

Due to our previous determination that the Truth in Lending Act is inapplicable in the instant case, we conclude that the circuit court did not abuse its discretion in denying sanctions.

Did the circuit court abuse its discretion when it denied McAuley's request for pre-trial discovery? McAuley contends that he was prejudiced when the circuit court denied him the opportunity to conduct formal pre-trial discovery and to examine Kennay at trial concerning whether and to what extent she had filed an assumed name filing. Kennay, however, contends that the circuit court properly denied McAuley's attempt to perform exhaustive pre-trial discovery.

Supreme Court Rule 287(a) governs pre-trial discovery in small claims cases and states, in pertinent part:

> "No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court." 134 Ill.2d R 287 (a).

Supreme Court Rule 287(b) further states, in relevant part:

> "In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in the direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties." 134 Ill.2d R. 287 (b).

At bar, McAuley's pre-trial discovery motion requested, *inter alia*, that Kennay produce documents pertaining to Kennay's relationship with Jones, Jones' employee personnel file, Kennay's federal and state income tax documents claiming income or expenses resulting from work that Jones performed, and documents identifying any insurance coverage Kennay paid for relating to Jones. McAuley's request for discovery clearly would have caused unnecessary delay and needless increase in the litigation costs. Hence, the circuit court did not abuse its discretion when it properly applied Supreme Court Rule 287 in denying McAuley's request for pre-trial discovery.

McAuley further asserts that the circuit court committed reversible error when it denied him the opportunity to present an offer of proof regarding whether Kennay lawfully conducted her business using a fictitious or assumed name. McAuley claims that Kennay failed to present any factual evidence supporting that she was engaged in a lawful business. Further, he asserts that she had not, as statutorily required, filed an assumed name business filing. Kennay argues that she did not hold herself out to be a professional corporation, but rather a

sole proprietorship. Moreover, Kennay asserts that McAuley cites no legal authority supporting that an unincorporated employer cannot hold a party liable for breach of a contract entered into with such employer.

Where a party fails to cite supporting authority for his contentions, a reviewing court may deem the argument waived. See Supreme Court Rule 341(e)(7) (177 Ill.2d R. 341(e)(7)). Due to McAuley's failure to provide this court with authority supporting his contentions, we deem this argument waived.

Last, McAuley claims that the circuit court failed to base its judgment on the evidence adduced at trial. Specifically, he contends, *inter alia*, the circuit court (1) improperly denied his statute of frauds assertion, (2) failed to require that Kennay prove her allegation of doing business as In Totidem Verbis, (3) improperly denied McAuley pre-trial discovery, and (4) improperly permitted Kennay to use exhibits without copy. Conversely, Kennay claims that McAuley's argument is based only upon the circuit court's following statement:

> "Everything in my experience as an attorney and everything that I have experienced as an associate judge for almost three years now tells me that Ms. Jones made the – or, inquired as to whether or not transcripts and copies were going to be asked of – or, were going to be requested by the parties, by the attorneys; that that was the manner in which she conducted every deposition, and that she received a response from these respective attorneys as she testified here to (sic) today and as the court has already made reference to."

Further, Kennay argues that the circuit court properly resolved any question of credibility as the circuit court's statement does not indicate that it disregarded the evidence adduced at trial.

We initially note the circuit court's earlier statement, expressing that its role was "to determine * * * the facts of this case and apply the law to the facts * * * and make a determination as to whether or not the plaintiff should, in fact, prevail." Additionally, the record supports the following facts: (1) McAuley scheduled the deposition at issue for January 13, 1998; (2) McAuley was in contact with Kennay prior to the deposition regarding payment of a prior bill; (3) McAuley resolved the payment dispute prior to the scheduled deposition to ensure a court reporter's presence; (4) McAuley represented one of the deponents and deposed the other deponent at the January 13, 1998, deposition; and (5) McAuley ordered a copy of one deposition and an original of the other deposition at issue. Accordingly, we conclude that the circuit court properly determined that McAuley had ordered the deposition transcriptions. We further conclude that the circuit court properly applied section 28 of the Act to its factual finding, entering judgment in favor of Kennay.

CONCLUSION

In sum, we conclude that (1) McAuley lacked standing to argue sections 12 and 13 of the Act are unconstitutionally overbroad and vague; (2) no conflicts exits [sic] between section 28 of the Illinois Certified Shorthand Reporters Act and Supreme Court Rule 208; (3) the circuit court did not err in dismissing McAuley's counterclaim because the Truth in Lending Act is inapplicable; (4) the

circuit court did not abuse its discretion in denying McAuley's request for sanctions; (5) the circuit court did not abuse its discretion in denying McAuley's request for pre-trial discovery; and (6) the circuit court properly based its judgment on the evidence adduced at trial. Accordingly, we affirm.

Affirmed.

KOEHLER, J., with HOMER and LYTTON, JJ., concurring.

No. 02-0417 (4)

Supreme Court U.S.
FILED
OCT 29 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DONAN B. MCAULEY,

PETITIONER

V.

DORIS KENNAY OR D/B/A AS IN TOTIDEM VERBIS, AND SUPREME COURT OF ILLINOIS

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

REPLY BRIEF OF PETITIONER

DONAN B. MCAULEY
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ARGUMENT

Kennay claim of state court "fact" determination is error, state court de novo decision is one of law.

Respondent DORIS J. KENNAY (hereafter "Kennay") without citation to authority which should be sufficient in itself to disregard her argument nevertheless presents a faulty proposition in her Brief in Opposition to Petition for Writ of Certiorari that the state court(s) "as matter of fact" denied Petitioner DONAN B. McAULEY's (hereafter "McAuley") counterclaim upon which sanctions were imposed for appealing the dismissal of the counterclaim. As set forth in Petitioner's App. p. 19 the trial court did not set forth upon which statute the federal truth-in-lending counterclaim was dismissed and the Third District Appellate Court also did not, Petitioner's App. p. 7.

Since Kennay's motion for dismissal of the counterclaim was not supported by affidavit or specificity her motion fell within the area of confluence between 735 ILCS 5/2-615 and 735 ILCS 5/2-619, *Illinois Graphics* Co. *v. Nickum, 159 Ill. 2d 469, 486, 639 N.E.2d 1282 (1994),* and the appropriate method for reaching the claimed defect is a section 2-615 motion (735 ILCS 5/2-615). *Rowan v. Novotny, 157 Ill. App. 3d 691, 693-94, 510 N.E.2d 1111 (1987).* A 2-615 motion attacks the legal sufficiency of the complaint by alleging defects on the face of the complaint. *Van Horne v. Muller, 185 Ill. 2d 299, 305, 705 N.E.2d 898 (1998).* Thus, a reviewing court is only concerned with a question of law as presented by the pleadings, in this case a counterclaim.

Because the resolution of the motion involves only a question of law, review is de novo. *Stephen L. Winternitz, Inc. v. National Bank of Monmouth, 289 Ill. App. 3d 753, 755, 683 N.E.2d 492 (1997).*

Moreover, since the court(s) had ruled after denying McAuley discovery, App. p. 19, and information was within Kennay's knowledge and control, it was error for the state court to require precision pleading, *Bryson v. News America Publications, 174 Ill.2d 77, 110, 672 N.E.2d 1207 (1996),* and McAuley's counterclaim, App. p. 13-14, set forth a plain and concise statement sufficient as a cause of action. *Rodgers v. Whitley, 282 Ill. App. 3d 741, 749, 668 N.E.2d 1023 (1996).*

The position of Kennay that there is presented to this Court only a fact determination by the lower courts is patently baseless. Moreover, this Court should not give credence to Kennay's argument made without citation of authority when as shown above the authority that exists is directly contrary.

Respectfully submitted,

/s/ Donan B. McAuley

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Certificate of Service

The undersigned certifies he mailed, postage prepaid, on October _____, 2002, 40 copies of his Reply Brief to United States Supreme Court, Attn Clerk of Court, Supreme Court Building, Washington DC 20543; three copies to Mr. James Mertes, Attorney, 102 E. Route 30, Rock Falls Il 61071 and copy to Supreme Court of Illinois, Attn Clerk of Court, Supreme Court Building, Springfield, IL 62706.

/s/ Donan B. McAuley

Donan B. McAuley